No. 02-750 NOV 12 2002

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ROGERS MACHINERY COMPANY, INC.,
Petitioner,

v.

CITY OF TIGARD, AND
WASHINGTON COUNTY,
Respondents.

Petition for a Writ of Certiorari to the Oregon Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

DAVID J. HUNNICUTT *
DOROTHY S. COFIELD
OREGONIANS IN ACTION
LEGAL CENTER
8255 S.W. Hunziker Rd.
Suite 200
Tigard, Oregon 97283
(503) 620-0258

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

May a local government exact development fees it has adopted through a legislative process without complying with the "rough proportionality" standards of *Dolan v. City of Tigard*, 512 U.S. 374 (1994)?

CORPORATE DISCLOSURE STATEMENT

Petitioner Rogers Machinery Company, Inc. is a privately held corporation. It has no parent corporation or subsidiary.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	iv
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND MUNICIPAL CODE PROVISIONS AT ISSUE	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	5
I. THE LOWER COURTS ARE HOPELESSLY SPLIT ON THE APPLICABILITY OF *DOLAN* TO LEGISLATIVELY IMPOSED EXACTIONS	5
A. Cases Applying *Dolan* to Legislative Exactions	6
B. Courts Applying the Legislative Exaction/ Adjudicative Exaction Distinction	9
C. The Court's Response to the Legislative/Adjudicative Distinction	11
II. LIMITING THE APPLICABILITY OF *DOLAN* TO ADJUDICATIVELY IMPOSED EXACTIONS IS CONTRARY TO THE TAKINGS CLAUSE AND EVISCERATES *DOLAN*	12
CONCLUSION	19

TABLE OF AUTHORITIES

CASES	Page
Agins v. City of Tiburon, 447 U.S. 255 (1980)	7, 18
Arcadia Development Corp. v. City of Bloomington, 552 N.W.2d 281 (Minn. 1996)	10
Armstrong v. United States, 364 U.S. 40 (1960)	3, 7, 16
Benchmark Land Co. v. City of Battle Ground, 14 P.3d 172 (Wash. 2000), *aff'd*, 49 P.3d 860 (Wash. 2002)	6-7
Chicago, B. &Q. R. Co. v. Chicago, 166 U.S. 226 (1897)	13
Dolan v. City of Tigard, 512 U.S. 374 (1994)	*passim*
Ehrlich v. City of Culver City, 911 P.2d 429 (Cal. 1996)	9-10
Home Builders Association of Central Arizona v. City of Scottsdale, 930 P.2d 993 (Ariz. 1997), *cert. denied*, 521 U.S. 1120 (1997)	10
Home Builders Association of Dayton and the *Miami Valley v. City of Beavercreek*, 729 N.E.2d 349 (Ohio 2000)	6
Krupp v. Breckenridge Sanitation District, 19 P.3d 687 (Colo. 2001)	10
Manocherian v. Lenox Hill Hospital, 643 N.E.2d 479 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1995)	7-8
McClure v. City of Springfield, 28 P.3d 1222 (Or. 2001)	9
Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987)	6-8
Northern Illinois Homebuilders Association v. County of Du Page, 649 N.E.2d 384 (Ill. 1995)	8

TABLE OF AUTHORITIES—Continued

	Page
Parking Association of Georgia, Inc. v. City of Atlanta, 450 S.E.2d 200 (Ga. 1994), *cert. denied*, 515 U.S. 1116 (1995)	10
Penn Central Transportation Co. v. New *York City*, 438 U.S. 104 (1978)	7
Pioneer Trust & Savings Bank v. Mount Prospect, 176 N.E.2d 799 (Ill. 1961)	8
San Remo Hotel, L.P. v. City and County *of San Francisco*, 41 P.3d 87 (Cal. 2002)	9, 14, 15
Schultz v. City of Grants Pass, 884 P.2d 569 (Or. 1995)	9
Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 122 S.Ct. 1465 (2002)	13
Trimen Development Co. v. King County, 877 P.2d 187 (Wash. 1994)	7
Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)	18
UNITED STATES CONSTITUTION	
Amend V	*passim*
Amend. XIV	2, 13
STATUTE	
28 U.S.C. 1257	2
SUPREME COURT RULE	
Rule 13	2

TABLE OF AUTHORITIES—Continued

MISCELLANEOUS

Page

Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed From Penn Central to Dolan, and What State and Federal Courts Are Doing About It*, 28 Stetson L. Rev. 523 (1999) 18

Dana, *Land Use Regulation In An Age of Heightened Scrutiny*, 75 N.C.L. Rev. 1243 (1997) 5

Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 Yale L.J. 385 (1977) 15

Faus, *Exactions, Impact Fees, and Dedications – Local Government Responses to Nollan/Dolan Takings Law Issues*, 29 Stetson L. Rev. 675 (2000) 5

Gillette and Hopkins, *Federal User Fees: A Legal and Economic Analysis*, 67 B.U.L. Rev. 795 (1987) 12

Kmiec, *Private Property and the Future of Government Regulation: Inserting the Last Remaining Pieces Into the Takings Puzzle*, 38 Wm. And Mary L. Rev. 995 (1997) 13, 17

Reznik, *The Distinction Between Legislative and Adjudicative Decisions In Dolan v. City of Tigard*, 75 N.Y.U.L. Rev. 242 (2000) 15, 17

Sterk, *Nollan, Henry George, and Exactions*, 88 Colum. L. Rev. 1731 (1988) 12

IN THE

Supreme Court of the United States

No. 02-___

ROGERS MACHINERY COMPANY, INC.,
Petitioner,

v.

CITY OF TIGARD, AND
WASHINGTON COUNTY,
Respondents.

Petition for a Writ of Certiorari to the Oregon Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

Petitioner Rogers Machinery Company, Inc. (Rogers) respectfully petitions for a writ of certiorari to review the judgment of the Oregon Court of Appeals.

OPINIONS BELOW

The Opinion of the Oregon Court of Appeals is reproduced as Appendix A to this petition. The Order Denying Review of the Oregon Supreme Court is reproduced as Appendix B to this petition. The Judgment of the Washington County Circuit Court is reproduced as Appendix C to this petition. The letter opinion of the Washington County Circuit Court, Judge Thomas Kohl, is reproduced as Appendix D to this petition. The Findings, Conclusions, and Order of the Washington

County Hearings Officer is reproduced as Appendix E to this petition. Finally, the Washington County Traffic Impact Fee ordinance is reproduced as Appendix F to this petition.

JURISDICTION

The Order Denying Review of the Oregon Supreme Court was filed on August 13, 2002. The opinion of the Oregon Court of Appeals was filed on May 8, 2002. This petition is timely under Supreme Court Rule 13.1. The Court has jurisdiction of this matter pursuant to 28 U.S.C. 1257(a).

CONSTITUTIONAL AND MUNICIPAL CODE PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in relevant part: "nor shall private property be taken for public use without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in relevant part: "nor shall any state deprive any person of life, liberty, or property, without due process of law."

Section 3.17 of the Washington County Code contains the County's Traffic Impact Fee (TIF) ordinance. The ordinance is set forth in full in Appendix F.

STATEMENT OF THE CASE

Rogers Machinery Company, Inc. (Rogers) operates its Corporate Headquarters and its Portland branch from its building in Tigard, Oregon. Rogers manufactures, sells, distributes and services compressors, pumps, and blowers.

Until 1997, Rogers' Corporate Headquarters and its Portland branch were located in a single building. Over the years, Rogers' building had become outdated and overcrowded. As a result, in February, 1997 Rogers applied

to the City of Tigard for a building permit to construct a new building at the same location as the existing building. Appendix A at 2. The purpose of the new building was to relieve the overcrowding in the existing building. Rogers planned to move approximately 40 employees from the old building to the new building. No additional employees were being hired, however, and it was undisputed that Rogers' plans would not result in additional traffic.

Despite the fact that Rogers' new building would generate no additional traffic, the City refused to issue Rogers' building permit until Rogers agreed to pay a $37,102 traffic impact fee (TIF). The TIF is a legislatively adopted ordinance designed to "ensure that new development contributes to extra capacity transportation improvements needed to accommodate additional traffic generated by such development." Appendix F at 47. The TIF is calculated according to a set formula that measures the number of new automobile trips that a new building may generate, based upon its size and use, multiplied by a set dollar figure per trip. *Id.* at 52. From those calculations, a hypothetical traffic impact is calculated. *Id.* at 52. Actual traffic impacts for a particular development are not factored into the TIF calculation.

Rogers objected to the condition that it pay the TIF in exchange for its building permit, and appealed the City's demand to the Washington County Hearings Officer. Appendix A at 2. Rogers' raised constitutional and statutory challenges to the imposition of the TIF. Specifically, Rogers argued that imposition of the TIF, as applied to Rogers, violated the Takings Clause of the Fifth Amendment to the United States Constitution, because the amount of the TIF was not "roughly proportional" to the traffic impacts caused by Rogers' new building, and was not based on an individualized determination of the actual traffic impacts resulting from Rogers' development, as required by *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

The Hearings Officer agreed with Rogers that no new traffic would be generated by Rogers' new building, and made a specific finding to that effect. Appendix E at 46. That finding is unchallenged. Nevertheless, the Hearings Officer held that the TIF is a tax, and that *Dolan v. City of Tigard*, 512 U.S. 374 (1994) does not apply to taxes. *Id.* at 45-46.

Rogers paid the TIF, which was recalculated by the city and totaled $37,018, and commenced an action in the Washington County Circuit Court. Appendix A at 3. Again, Rogers argued that application of the TIF to Rogers did not comport with *Dolan*. *Id.* at 3. The trial court disagreed, holding in a one page letter opinion that the TIF is a tax to which *Dolan* did not apply, not a fee. Appendix D.

Rogers appealed the trial court's decision to the Oregon Court of Appeals. Although the parties briefed and argued the trial court's tax versus fee distinction, the Oregon Court of Appeals ignored the trial court's ruling. Appendix A at 12-14. The court held that the TIF had elements of both a tax and fee under Oregon law, and that the tax versus fee argument would not be responsive to Rogers' takings argument. *Id.* at 12-14.[1]

Rogers reiterated its constitutional and statutory challenges, arguing that imposition of the TIF to Rogers resulted in a Fifth Amendment taking, as interpreted by the Court in *Dolan*. Appendix A at 3-4. The Oregon Court of Appeals rejected Rogers' argument, distinguishing between legislatively imposed exactions and adjudicatively imposed exactions. According to the court, the TIF is "a generally applicable development fee imposed on a broad range of specific, legislatively determined subcategories of property through a scheme that leaves no meaningful discretion either

---

[1] This petition does not address the court's tax/fee analysis, since it was based on Oregon law and played no role in the court's ruling.

in the imposition or in the calculation of the fee." *Id.* at 36. The court concluded, "*Dolan*'s heightened scrutiny does not extend to development fees of that kind." *Id.* at 36.

The Oregon Supreme Court denied Rogers' petition for review. Appendix B. To challenge the ruling of the Oregon Court of Appeals, Rogers timely files this petition for certiorari.

REASONS FOR GRANTING THE WRIT

I. THE LOWER COURTS ARE HOPELESSLY SPLIT ON THE APPLICABILITY OF *DOLAN* TO LEGISLATIVELY IMPOSED EXACTIONS

There is a split of authority recognized by the Oregon Court of Appeals, legal scholars, and others regarding the applicability of *Dolan* to legislatively adopted exactions.[2] Some lower courts apply *Dolan's* heightened scrutiny to exactions derived from legislatively adopted formulas, while other courts limit *Dolan's* applicability to ad hoc exactions created for a specific land use application. This split of authority results in uncertainty for all parties involved in land use planning and development, and can only be rectified by the Court. This case presents the opportunity for the Court to further clarify *Dolan*, and eliminate an issue that has confounded lower courts and scholars alike.

---

[2] *See* Rogers, (Appendix A at 23) (noting split in lower courts); Faus, *Exactions, Impact Fees, and Dedications - Local Government Responses to Nollan/Dolan Takings Law Issues*, 29 Stetson L. Rev. 675, 704-06 (2000) (noting "nationwide split of authority on whether exactions based on clear and objective standards are subject to *Dolan*" and indicating that "a strong argument exists" for limiting applicability of *Dolan* to adjudicative exactions; Dana, *Land Use Regulation In An Age of Heightened Scrutiny*, 75 N.C.L. Rev. 1243, 1260-61 (1997) (noting that *Dolan* applies to legislative exactions).

A. Cases Applying *Dolan* to Legislative Exactions

A number of lower courts apply *Dolan* to legislatively adopted exactions. For example, in *Home Builders Association of Dayton v. City of Beavercreek*, 729 N.E.2d 349 (Ohio 2000), the Ohio Supreme Court applied a "dual rational nexus" test "based on the *Nollan* and *Dolan* cases" to a transportation impact fee ordinance adopted by the City of Beavercreek.[3] The impact fee was "payable by developers of real estate to aid in the cost of new roadway projects," and was challenged as a taking of property under both the Ohio and United States' Constitutions. *Id.* at 353-54.

As did the Court in *Dolan*, the Ohio Supreme Court compared the various methodologies adopted by other states for determining the constitutionality of an impact fee ordinance, and applied the "dual rational nexus" test, holding that this test provided a middle level of scrutiny required by *Dolan*. *Id.* at 356. After applying the test, the court upheld the ordinance. *Id.* at 358.

In *Benchmark Land Co. v. City of Battle Ground*, 14 P.3d 172 (Wash. 2000), *aff'd*, 49 P.3d 860 (Wash. 2002), the Washington Court of Appeals (Division Two) applied *Dolan* to an exaction requiring the developer to pay for offsite traffic improvements. The requirement for the payment of the improvements was based on clear and objective provisions of the Battle Ground Municipal Code, a legislatively adopted ordinance.[4] The court rejected the city's argument that the

---

[3] *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

[4] Although the Oregon Court of Appeals questioned Rogers reliance on the *Benchmark* opinion on the ground that it was unclear whether the exaction was legislatively mandated or was adjudicative in nature, the subsequent opinion of the Washington Supreme Court, which was issued after the Rogers opinion, makes clear that the exactions imposed by the City of Battle Ground were legislative in nature. *See Benchmark*, 49 P.3d at 862.

exaction should be reviewed under the two-prong test in *Agins v. City of Tiburon*, 447 U.S. 255 (1980) or the three-prong test in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), and instead applied *Dolan*. *Id.* at 175. The court, quoting this Court's language from *Armstrong v. United States*, 364 U.S. 40 (1960), held:

> Further, if the *Dolan* proportionality test does not apply, the government can exact conditions such as the one here with few limits. The condition advances a legitimate state interest—improving the public roads. And the condition does not deny the developer all economically viable use of its land. But the condition also seeks to force "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." It is this attempted transfer of a public burden that calls for a *Dolan* proportionality test.

Id. at 175 (footnote and citation omitted).

In *Trimen Development Co. v. King County*, 877 P.2d 187 (Wash. 1994), the Washington Supreme Court applied *Dolan* to a legislatively adopted park development fee which the county required the developer to pay in lieu of dedication of land for open space. The court reached the following conclusion-"We conclude therefore that the fees imposed in lieu of dedication were reasonably necessary as a direct result of Trimen's proposed development. See *Dolan v. City of Tigard* ('rough proportionality' between required dedication and impact of proposed development)". *Id.* at 194.

The New York Court of Appeals applied *Nollan* and *Dolan* to a rent stabilization statute in *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1995). The statute, which was obviously legislatively adopted, required owners of certain apartments in New York City to offer leases in perpetuity on those apartments to the hospital for use by the hospital's employees. The court

invalidated the statute, finding that it did not substantially advance a "closely and legitimately connected State interest." *Id.* at 480. According to the court, in order for a substantial state purpose to be present, there must be a "close causal nexus" between the legislation and the problem it seeks to remedy. *Id.* at 482. The court found that the "close causal nexus" requirement was established by *Dolan*, and that *Dolan* and the other Supreme Court takings cases establish a "constitutional minimum floor of protection which this Court lacks authority to diminish under the Supremacy Clause." *Id.* at 482.

The Illinois Supreme Court applied *Nollan* and *Dolan* to a legislatively adopted transporation impact fee in *Northern Illinois Homebuilders Association v. County of Du Page*, 649 N.E.2d 384 (Ill. 1995). The Homebuilders Association challenged the impact fee ordinance and enabling state legislation on the ground that it violated the takings clauses of the United States and Illinois Constitutions. *Id.* at 388. The court relied on *Nollan* and *Dolan* for establishing a minimum standard for determining whether an exaction satisfies the Takings Clause, and went beyond *Dolan*'s "rough proportionality" test, applying the "specifically and uniquely attributable" test to determine whether the impact fees were sufficiently related to the impact on the county's transportation system resulting from new development.[5] *Id.* at 389.

---

[5] The court relied on its previous decision in *Pioneer Trust & Savings Bank v. Mount Prospect*, 176 N.E.2d 799 (Ill. 1961), as authority for going beyond *Dolan's* "rough proportionality" requirement to the "specifically and uniquely attributable" test. The Court in *Dolan* described this test as requiring an even more exacting correspondence between the exaction and the impact caused by new development than the "rough proportionality test" that the Court ultimately adopted. *Dolan*, 512 U.S. at 389-91 (1994).

The Oregon Court of Appeals applied *Dolan* to a legislatively adopted exaction in *Schultz v. City of Grants Pass*, 884 P.2d 569 (Or. 1995). The city conditioned approval of an application to partition property upon the dedication of a portion of the property for street improvements. The city argued that the imposition of the dedication requirements was legislative, as the city zoning ordinance required the imposition of the conditions. *Id.* at 573. The court rejected that argument, holding that even if the ordinance required the imposition of the conditions (and was thus legislative), *Dolan* remained applicable, as the conditions required the owner to deed portions of the property to the local government. *Id.* at 573.[6]

B. Courts Applying the Legislative Exaction/ Adjudicative Exaction Distinction

In addition to the Oregon Court of Appeals, a number of other courts distinguish between exactions imposed pursuant to a legislatively enacted ordinance, and those imposed on a discretionary, adjudicative basis. The California Supreme Court applies *Dolan* to monetary exactions imposed on an individualized and discretionary basis, but does not apply *Dolan* to monetary exactions imposed "generally" and "ministerially." *Ehrlich v. City of Culver City*, 911 P.2d 429, 444 (Cal. 1996); *San Remo Hotel L.P. v. City and County of San Francisco*, 41 P.3d 87, 102-104 (Cal. 2002). The court bases the legislative/adjudicative distinction on the "heightened risk of extortion," which the court believes is

---

[6] In *McClure v. City of Springfield*, 28 P.3d 1222 (Or. 2001), the Oregon Court of Appeals reiterated its holding in *Schultz*, indicating that *Schultz* held "that it is the 'character of the restriction' that triggers the *Dolan* analysis, not whether it was imposed pursuant to local legislation." *Id.* at 1228 n.6. Thus it is clear that for purposes of the applicability of *Dolan*, the court in *Schultz* rejected the legislative/adjudicative distinction, and relied on the distinction between the type of exaction (real property v. money). Yet in *Rogers*, the court revitalizes the legislative/adjudicative distinction, at least as to monetary exactions. Appendix A at 33.

present in the case of adjudicative exactions, and absent in the case of legislative exactions. *Ehrlich*, 911 P.2d at 444.

In *Arcadia Development Corp. v. City of Bloomington*, 552 N.W.2d 281 (Minn. 1996), the Minnesota Court of Appeals refused to apply *Dolan* to a city ordinance requiring mobile home park owners to pay relocation costs to their tenants upon closure of the park. The court, relying on a narrow interpretation of *Dolan* with no discussion of the rationale for its holding, held that *Dolan* does not apply to "citywide, legislative land-use regulations." *Id.* at 286. The court also held that *Dolan* is limited to exactions of real property. *Id.* at 286.

In *Home Builders Association v. City of Scottsdale*, 930 P.2d 993, (Ariz. 1997) *cert. denied*, 521 U.S. 1120 (1997), the Arizona Supreme Court refused to apply *Dolan* to a water resources development fee, which the court characterized as a generally applicable legislative fee. *Id.* at 1000. The court noted that the question was unsettled, citing the dissent of Justices Thomas and O'Connor in *Parking Ass'n of Georgia, Inc. v. City of Atlanta*, 450 S.E.2d 200 (Ga. 1994), *cert. denied*, 515 U.S. 1116 (1995) (Thomas, J., dissenting). Nevertheless, the court held that the risk of leveraging on the part of the local government is nonexistent when the exaction is legislatively adopted. *Id.* At 1000.

The Colorado Supreme Court rejected a *Dolan* challenge to a "plant impact fee" in *Krupp v. Breckenridge Sanitation District*, 19 P.3d 687 (Colo. 2001). The court held that the fee was a generally applicable service fee on all new development within the district, and that *Dolan* was inapplicable to legislatively based fees, as all similarly situated landowners are subject to the same fee, and no one single landowner could be singled out for "extraordinary concessions." *Id.* at 696. The court also refused to apply *Dolan* to exactions that do not involve the dedication of real property. *Id.* at 697-98.

C. The Court's Response to the Legislative/ Adjudicative Distinction

As the Oregon Court of Appeals notes in *Rogers*, in the eight years since *Dolan* was decided, the Court has declined to grant certiorari in cases that would provide further guidance to lower courts on the applicability of *Dolan* to legislative exactions. Appendix A at 21. As an example, the court cites to the denial of certiorari in *Parking Association of Georgia v. City of Atlanta*, 450 S.E.2d 200 (Ga. 1994), *cert. denied,* 515 U.S. 1116 (1995) (Thomas, J., dissenting).

In *Parking Association*, the Georgia Supreme Court refused to apply *Dolan* to an Atlanta ordinance requiring minimum curb barriers and landscaping in parking lots. *Parking Association*, 450 S.E.2d at 203. The court held that *Dolan* did not apply to legislative determinations that simply limited the use of property, apparently (but not clearly) contrasting that situation with one in which an exaction is imposed. *Id.* at 203.

The plaintiff filed a petition for certiorari to the Court, which denied the petition. Justice Thomas, joined by Justice O'Connor, dissented from the denial of certiorari. *Parking Association*, 515 U.S. at 1116. In their dissent, Justice Thomas noted the lower courts' confusion over the applicability of *Dolan* and the split in the lower courts (which was small at the time), and questioned the logic of distinguishing between legislative and adjudicative exactions.[7] *Id.*

---

[7] Given the facts of *Parking Association*, the legislative/adjudicative distinction considered by Justice Thomas appears to be that between an ordinance of general applicability (such as a zoning ordinance) and the application of an ordinance in the form of an exaction. By refusing to apply *Dolan* to exactions that were created legislatively, the Oregon Court of Appeals and the other lower courts making the legislative/adjudicative

In the years since Justice Thomas' dissent, the confusion in the lower courts over the applicability of *Dolan* has increased, and the split has widened. Given the importance of the issue, a ruling from the Court would be welcome relief for all involved.

II. LIMITING THE APPLICABILITY OF *DOLAN* TO ADJUDICATIVELY IMPOSED EXACTIONS IS CONTRARY TO THE TAKINGS CLAUSE AND EVISCERATES *DOLAN*

As Justice Stevens noted in the first paragraph of his dissent in *Dolan*, *Dolan* is "unquestionably an important case." *Dolan*, 512 U.S. at 396. That was true in 1994, and is equally true today. Local governments are increasingly relying on exactions as a substitute for politically unpopular tax increases.[8] The *Dolan* decision has been the subject of innumerable law review articles and court opinions. The Court's holding significantly impacts local government officials, land use planners, land use attorneys, environmentalists, property rights advocates, business owners, and landowners throughout the country.

The *Rogers* decision substantially weakens the Court's holding in *Dolan*. By carving out an exception for monetary exactions imposed legislatively, as opposed to exactions imposed on an individualized, adjudicative basis, the Oregon Court of Appeals creates an exception that swallows the rule, thereby eviscerating *Dolan*. Not only is this contrary to *Dolan*, it is at odds with the purposes of the Takings Clause.

---

distinction have limited *Dolan* to an even greater extent than that which Justice Thomas was discussing in *Parking Association*.

[8] Sterk, *Nollan, Henry George, and Exactions*, 88 Colum. L. Rev. 1731 (1988); also *see* Gillette and Hopkins, *Federal User Fees: A Legal and Economic Analysis*, 67 B.U.L. Rev. 795, 796 n.3 (1987) (citing authorities establishing that user fees are the fastest growing component of local government revenues).

The Takings Clause of the Fifth Amendment, made applicable to the states via the Fourteenth Amendment[9], is designed to protect the minority from the unfettered will of the majority. As the Court notes, one of the principal purposes of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

Exactions are but one form of land use regulation that implicates the Takings Clause. *Cf. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 122 S.Ct. 1465, 1478-79 (2002) (discussing takings arising by physical occupation and regulatory takings arising from regulations limiting the use of property). In *Rogers*, the Oregon Court of Appeals defined an exaction as an in-kind property dedication, a fee in lieu of a property dedication, or an impact fee or special assessment to cover the cost of development. Appendix A at 14 (citing Bell and Parchomovsky, *Givings*, 111 Yale L.J. 547 (2001)).

Unlike other forms of land use regulation, an exaction arises at a time when the inequity in bargaining power between the applicant for a development permit and the local government is at its peak. The government has a monopoly power over the issuance of development permits. If an applicant for a development permit does not accede to the local government's exaction demands, the permit will not be issued. For that reason, exactions create a heightened risk for extortionate behavior by local governments.[10] Whether the exaction is imposed through a legislatively adopted formula (where the discretion rests with the legislative body creating

---

[9] *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 239 (1897).

[10] *See* Kmiec, *Private Property and the Future of Government Regulation: Inserting the Last Remaining Pieces Into the Takings Puzzle*, 38 Wm. and Mary L. Rev. 995, 1039-40 (1997).

the formula) or on an adjudicative, case by case basis (where the discretion rests with the planner or planning commission) is of little distinction to the applicant. In either event, the applicant's ability to object to an unconstitutional demand is severely compromised by the fact that the applicant is seeking something that only the local government can provide.

As illustrated above, the lower courts limiting *Dolan*'s holding to adjudicative exactions base their decision on the lessened risk of extortionate behavior resulting from the application of a legislatively adopted exaction. In *Rogers*, the Oregon Court of Appeals cited and adopted the following passage from a concurring opinion of Justice Mosk of the California Supreme Court:

> While legislatively mandated fees do present some danger of improper leveraging, such generally applicable legislation is subject to the ordinary restraints of the democratic political process. A city council that charged extortionate fees for all property development, unjustifiable by mitigation needs, would likely face widespread and well-financed opposition at the next election. Ad hoc individual monetary exactions deserve special judicial scrutiny mainly because, affecting fewer citizens and evading systematic assessment, they are more likely to escape such political controls.

Rogers, quoting *San Remo Hotel v. City and County of San Francisco*, 41 P.3d 87, 105 (Ca. 2002) (Mosk, J., concurring). But the logic behind this rationalization is elusive. In fact, the risk of extortionate behavior on the part of local government is every bit as high in the context of the adoption of a legislative exaction as it is in the adoption of an adjudicative exaction.

Since exactions are used to provide public services that would otherwise be funded by broadly based taxes (or not provided at all), they provide a form of raising revenue for public projects that affects a minuscule minority of the voting

populace (the developers, who may or may not be residents of the community, and those landowners who are currently contemplating a development project). Contrary to the court's logic in *San Remo*, an exaction can be used to provide the vast majority of voters with something for nothing, allowing a city council to fund public projects on the backs of "greedy developers," "land barons," or whatever other politically popular phrase they can coin.[11] Applying the above quote from *San Remo*, why would there be "widespread and well financed opposition" from the voting populace to this type of fundraising scheme, and how could that opposition be effective?

The facts of *Rogers* serve to illustrate the flaw in the legislative/adjudicative distinction. Rogers was forced to contribute $37,018 to offset imaginary new traffic generated by Rogers' imaginary new employees driving their imaginary new cars. And in the meantime, the voters of the City of Tigard received a $37,018 windfall, which they could use for public services that they desired but did not want to pay for. After all, as the Washington County Hearings Officer concludes, there were no "traffic impacts" resulting from Rogers new building, and therefore no need to use the $37,018 collected from Rogers to make traffic improvements to offset Rogers development. Appendix E at 45.

Moreover, the legislative exaction/adjudicative exaction distinction developed by some lower courts creates a disincentive for local governments to tailor their exactions to offset the actual impacts created by a new development project. Imposing exactions in an adjudicative setting, where the exact impacts of a new development can be determined,

---

[11] *See* Reznik, *The Distinction Between Legislative and Adjudicative Decisions In Dolan v. City of Tigard*, 75 N.Y.U.L. Rev. 242, 270 (2000); Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 Yale L.J. 385, 405-07 (1977).

will invariably yield much more fair and precise results than attempting to adopt a "one size fits all" exaction legislatively.

But the legislative exaction/adjudicative exaction distinction punishes local governments for attempting to be fair and precise, by subjecting a more precise adjudicative ordinance to heightened scrutiny (and a shift in the burden of proof) under *Dolan*, and applying a lower level of scrutiny to a "one size fits all" legislative exaction. The imprecision of a legislatively enacted exaction will create situations where the land use applicant is overcharged and, in the words of *Armstrong*, 364 U.S. at 49, forced "to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." It will also create situations where the land use applicant is undercharged, thus providing a windfall to the applicant at the expense of the local taxpayers. It would be an odd result indeed to interpret the Takings Clause in a manner that promotes government imprecision at citizen expense.

Not only does the legislative exaction/adjudicative exaction distinction create a disincentive for local governments to be precise in their land use decisions, it also creates a myriad of interpretational problems for courts, local governments, and private citizens. Depending on the definitions of legislative and adjudicative, many exactions will contain elements of both.[12] For example, the exactions in *Dolan* and *Nollan* were imposed in the context of a quasi-judicial, adjudicative setting, but were based upon legislatively enacted provisions of a local government zoning ordinance. *Dolan*, 512 U.S. at 377-80; *Nollan*, 483 U.S. at 828-30. This mixture of

---

[12] See Reznik, *supra* note 11 at 260 ("Local governments do not exhibit, nor must they follow, strict notions of separation of powers requiring independent legislative, executive, and judicial branches with distinct roles.")

legislative and adjudicative acts is typical of land use actions, and makes the legislative/adjudicative distinction problematic.

Unfortunately, there is no clear definition of what is legislative and what is adjudicative in the context of land use law.[13] In fact, as *Dolan* and *Nollan* prove, the typical land use case involves both functions.[14] Drawing a distinction between legislative exactions and adjudicative exactions will require the lower courts to either 1) attempt to draw a clear line between the two, which will be difficult given the procedural nature and local government function in land use planning decision-making, or 2) create a standard that allows the determination to be made on a case-by-case basis, thus creating another "test" in takings law jurisprudence, an area that is already replete with "tests." In either event, without guidance from the Court, a further split (a "split of the split") in the lower courts that recognize the legislative exaction/adjudicative exaction distinction is probable, adding even more confusion to this area.

The cause of the much of the lower courts' confusion appears to stem from the *Dolan* opinion itself. In particular, the Court twice draws a distinction between the exaction imposed on *Dolan*, which the Court characterizes as an "adjudicative decision to condition petitioner's application for a building permit on an individual parcel," and "essentially legislative determinations classifying entire areas of the city,"

---

[13] See Kmiec, *supra* note 10 at 1041, Reznik, *supra* note 11 at 257-265.

[14] The facts of Rogers are further evidence of the lower courts confusion. Although the Oregon Court of Appeals insisted in Rogers that the TIF was a legislative exaction, counsel for Washington County acknowledged that there were elements of discretion involved in calculating the TIF, that selection of the most appropriate category of use (e.g. office, industrial, commercial etc.) would have a substantial effect on the amount of the TIF, and that the City had exercised discretion in determining the amount of the TIF. *See* Memorandum Regarding Motion To Dismiss (Washington County Circuit Court, C971202CV).

like the adoption of a zoning ordinance by the Village of Euclid in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) or the adoption of a "general plan governing both land use and the development of open space land" by the City of Tiburon in *Agins v. City of Tiburon* , 447 U.S. 255 (1980). *Dolan*, 512 U.S. at 385, 391 n.8 (1994).

There is nothing, however, in the Court's language to indicate that the Court intended to draw a distinction between differing types of exactions. Indeed, as one legal commentator notes, "why should a common legislative scheme of conditions escape scrutiny if it lacks either nexus or proportionality? An unconnected or disproportionate condition is extortionate, regardless." Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed From Penn Central to Dolan, and What State and Federal Courts Are Doing About It*, 28 Stetson L. Rev. 523, 575 (1999).

Instead, the more plausible reading of *Dolan* is that the Court was simply drawing a distinction between exactions, which typically involve the imposition of a legislatively adopted ordinance in the context of a single land use application, and zoning decisions made independently of a quasi-judicial decision on a particular land use application. In the latter instance, the risk of extortion is not as pervasive, as a property owner affected by the proposed land use regulation will not have to risk the loss of a development permit in order to object to the proposed regulation.

If allowed to stand, the interpretation of *Dolan* by the Oregon Court of Appeals and the appellate courts of the other states drawing the legislative exaction/adjudicative exaction distinction effectively nullifies the Court's holding, as any government lawyer worth her salt can craft a legislatively adopted ordinance imposing a fee exaction to provide some public benefit that they would otherwise be unable to achieve

if *Dolan's* "rough proportionality" analysis was applied, a result that seems antithetical to the Court's rationale. Surely *Dolan* means more than this.

CONCLUSION

For the foregoing reasons, petitioner prays that the Court grant the petition for writ of certiorari.

Respectfully submitted,

DAVID J. HUNNICUTT *
DOROTHY S. COFIELD
OREGONIANS IN ACTION
LEGAL CENTER
8255 S.W. Hunziker Rd.
Suite 200
Tigard, Oregon 97283
(503) 620-0258

* Counsel of Record

November 12, 2002

APPENDIX A

COURT OF APPEALS OF OREGON

[Filed May 8, 2002]

C971202CV; A104615

ROGERS MACHINERY, INC.,
Appellant,

v.

WASHINGTON COUNTY and CITY OF TIGARD,
Respondents.

December 13, 1999, Argued and Submitted

JUDGES: Before LANDAU, *Presiding Judge*, and LINDER and BREWER, *Judges*.

OPINION

LINDER, J.

Pursuant to ORS 34.010 *et seq.*, Rogers Machinery, Inc., petitioned for a writ of review to challenge the imposition of a Traffic Impact Fee (TIF) assessed under a Washington County ordinance. Respondents are Washington County and the City of Tigard, which jointly administer the ordinance.[1] The TIF is assessed against property developers to provide funds for improvements to city streets and arterials. Petitioner challenges the TIF assessed against it as a taking of its

---

[1] The ordinance establishing the TIF was approved by Washington County voters in November 1990. In 1994, Washington County and the City of Tigard entered into an intergovernmental agreement, pursuant to which the city administers the TIF as to property within the city limits. Relevant portions of the TIF are set out in the discussion below.

property without just compensation, in violation of the Fifth Amendment to the United States Constitution.[2] Petitioner also argues that the TIF ordinance violates state statutes governing system development charges (SDCs). We review to determine whether, in upholding the assessment, the trial court misconstrued the applicable law. ORS 34.040(1)(d), (e); *Johnson v. Civil Service Board*, 161 Ore. App. 489, 498, 985 P.2d 854, on recons 162 Ore. App. 527, 986 P.2d 666 (1999). We affirm.

The facts relevant to our review are not disputed. Petitioner operates a business that has its headquarters in the City of Tigard. Because of crowding in the existing headquarters building, petitioner decided to construct a second building on the same site. Petitioner planned to relocate approximately 40 employees from the existing building to the new one. In February 1997, petitioner applied for a building permit for the new building. After reviewing the permit application and other materials relating to the proposed development, the city determined that, under the TIF ordinance, petitioner's proposed development fit the use category of "general light industrial." Applying the formula applicable to that category, the city assessed a TIF of $37,102.[3]

Petitioner filed an administrative appeal of the assessment, raising its statutory and constitutional challenges to the TIF. *See* Washington County Code (WCC) § 3.17.110 (providing for appeals seeking refunds of monies collected under the

---

[2] The Takings Clause of the Fifth Amendment to the United States Constitution provides, in part:

> "Nor shall private property be taken for public use, without just compensation."

Petitioner does not raise a challenge under the parallel provisions of Article I, section 18, of the Oregon Constitution.

[3] The manner in which the calculation is made pursuant to the ordinance is described below.

TIF). After a hearing, a county hearing officer issued an order upholding the assessment generally but directing it to be recalculated based on the hearing officer's conclusion that the proposed development fit into three relevant use categories. The city recalculated the assessment, apportioning it according to the uses identified by the hearing officer and applying current rates; the recalculated assessment was $ 37,018.

After paying the assessment, petitioner brought this writ of review proceeding in circuit court, asserting that the TIF violates the federal Takings Clause. In particular, petitioner argued that the TIF is invalid under the individualized "rough proportionality" test announced in *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994). Petitioner also challenged the TIF as inconsistent with certain provisions of ORS chapter 223 relating to systems development charges.

In response to petitioner's federal constitutional challenge, respondents argued that the Takings Clause and *Dolan*'s rough proportionality test do not apply to the TIF, for three reasons: (1) the TIF is a tax, not an exaction; (2) the TIF is not the result of an ad hoc adjudicative decision; and (3) the TIF, even if it is an exaction, does not require the dedication of property. Respondents argued alternatively that, even if the test announced in *Dolan* applies to the TIF, the ordinance satisfies that test. In response to petitioner's claim that the TIF violates portions of ORS chapter 223, respondents argued that ORS chapter 223 does not apply to the TIF because it is a tax and not a systems development charge. Respondents asserted further that, if ORS chapter 223 does apply, petitioner's challenge to the TIF as inconsistent with that statutory scheme is both untimely and without merit. The circuit court rejected petitioner's challenge to the TIF, reasoning that the TIF is a tax and that *Dolan* therefore does not apply to it. The circuit court further concluded that the TIF is "compatible" with the provisions of ORS chapter 223 relating to systems development charges.

On appeal, the parties renew the arguments they made below.[4] We begin by describing the provisions of the ordinance and the assessment that it authorizes. We then consider petitioner's claim that the TIF is invalid under the statutes relating to system development charges. *See State v. Kennedy*, 295 Or 260, 262-65, 666 P.2d 1316 (1983) (statutory issues should be resolved before reaching constitutional issues). Because we reject that challenge, we finally consider petitioner's claim that the TIF violates the federal Takings Clause.

I. THE ORDINANCE IMPOSING THE TIF

Washington County first adopted the ordinance authorizing the TIF in 1985. In 1990, the ordinance was amended to apply to cities and was readopted as amended. The ordinance is codified in the Washington County Code as chapter 3.17 and, at the outset, identifies its purpose and scope as follows:

> "A. This tax is adopted to ensure that new development contributes to extra capacity transportation improvements needed to accommodate additional traffic generated by such development.
>
> "B. This tax shall provide funds for extra capacity improvements to county and city arterials and certain collectors or state facilities. It applies throughout the county, including within incorporated cities."

WCC § 3.17.020.

---

[4] By amendment at trial of its petition for writ of review, petitioner also sought restitution in the amount of the difference between the assessment imposed after its appeal, based on the new rate, and the assessment that would have been imposed using the rates in effect before its appeal. The circuit court rejected petitioner's argument in that regard, and petitioner assigns error to that ruling. We conclude that the circuit court did not err and that the issue does not merit further discussion. We therefore confine our decision to petitioner's statutory and constitutional challenges to imposition of the TIF.

Section 3.17.050 describes the method for determining the amount of the assessment to be imposed. In effect, under that section and Appendix A of the ordinance, the assessment depends on the type of use proposed for the new development. As pertinent here, the ordinance specifically provides:

> "A. The amount of the tax due shall be determined by multiplying the following applicable dollar amount, adjusted as provided in subsection E of this section, by the number of average weekday trips generated by the new development in accordance with the basis for trip determination set forth in Appendix A attached hereto and incorporated herein.
>
> "* * * * *
>
> "Office use $ 124 per average weekday trip
>
> "Industrial use $ 130 per average weekday trip
>
> "* * * * *
>
> "B. In the event an identified use does not have a basis for trip determination stated in Appendix A, *i.e.*, not available, the director [5] shall either:
>
> "1. Determine the trip generation based on the use listed in Appendix A most similar in traffic generation; or
>
> "2. At the election (and expense) of the applicant, consider actual trip generation of a same or similar use verified by a registered traffic engineer. In the event actual trip generation is utilized, the director may make such adjustments as he deems applicable in consideration of location, size and other appropriate factors in determining the average weekday trip.

---

[5] The "director" is the director of the county department of land use and transportation or, in those cities that collect and administer the tax themselves, the person charged with those duties. WCC § 3.17.020(O).

"C. It is recognized that single structures may include more than one use. In such event the director for purposes of establishing the traffic impact fee shall proportion the uses accordingly.

"D. The applicant shall, at the time of application for a building permit, provide the department with necessary and applicable information, such as the type of use, number of employees or square footage of structures, necessary to calculate the traffic impact fee."

Appendix A further sets out various specific land use categories (which are listed under the general categories of "residential," "institutional," "business and commercial," "office," and "industrial,"), the bases for "trip determination" for those categories (e.g., square footage, number of employees, or similar criteria), and the weekday and weekend average trip rates that apply to the various uses.[6] Using those calculations, the amount of the fee is then determined by applying a "weighted average daily" trip rate formula for the use.

WCC § 3.17.050(A).

Under subsection E of section 3.17.050, the dollar amounts specified in subsection A are subject to yearly increases of six percent or, if determined to be a "more accurate estimate of the increase or decrease in construction costs," they can be increased or decreased based on a "construction cost index" prepared and maintained by the county. In all events, any increase in the dollar amounts may not exceed six percent.

The tax is "due and payable at the time of issuance of a building permit[.]" WCC § 3.17.060(A). If the amount due

---

[6] The record shows that the City of Tigard used the Institute of Traffic Engineers (ITE) Trip Generation Manual, 4th Edition, in determining the land use categories applicable to particular developments. The record, however, does not include a copy of the manual.

for any one building exceeds $5,000, an applicant may request a "payment deferral," in which event payment is due when the occupancy permit issues. WCC § 3.17.060(B). Applicants may finance their TIF obligations with "Bancroft Bonding" under ORS 223.205 to ORS 223.295. *See* WCC § 3.17.060(C). The ordinance also provides for certain credits and offsets against the TIF obligation. For example, an applicant is entitled to a credit for constructing certain "eligible capital improvements," such as "extra capacity road or transit" improvements and improvements constructed "to address a safety hazard. "WCC § 3.17.070(A) and (B). If a developer files a written request for an offset within a specified time period after the assessing authority's acceptance of the traffic safety improvement, the developer is reimbursed for the cost of the improvement from TIF funds collected directly from that developer. WCC § 3.17.080. Developers may also apply for refunds of TIF payments. Refunds are granted upon a finding by the director of a clerical error in their calculation or, if the refund is timely requested, for failure to claim a credit or offset. WCC § 3.17.110.

Revenues generated by the TIF are deposited into dedicated funds. Under section 3.17.090(A), the funds "shall be used for no purpose other than those activities described as, or for the benefit of, extra capacity facilities as defined herein." Pursuant to section 3.17.100, authorized expenditures include those for new or expanded arterial and collector road projects, extra capacity transit projects, and the costs of administering the TIF assessments and the projects they fund. The county is required to review the TIF annually to ensure that revenues neither exceed nor fall short of amounts needed for identified extra capacity demands. WCC § 3.17.140.

An appeal is available to "any citizen or other interested person" to challenge an expenditure of TIF revenues. WCC § 3.17.150(A)(1). Also, any person "aggrieved by a dis-

cretionary decision of the director may appeal the decision to the county hearings officer." WCC § 3.17.150(B)(2). The decision of the county hearings officer is reviewable solely under ORS 34.010 through ORS 34.100 (writ of review) in circuit court. WCC § 3.17.150(B)(5).

II. PETITIONER'S STATUTORY CHALLENGE

As earlier noted, we begin with petitioner's statutory challenge to the TIF. Petitioner argues that the TIF is a "system development charge" and therefore must comply with the provisions of ORS chapter 223 governing such charges.[7] Specifically, petitioner contends that the TIF is an "improvement fee" as defined in ORS 223.299(2), which is one of two types of fees that qualify as a SDC. Petitioner asserts that the ordinance establishing the TIF fails to comply with the calculation methodology required by ORS 223.304(2) and that the TIF therefore is invalid.

Respondents answer with three arguments. First, both respondents assert that the TIF is a tax, not a fee or an assessment, and that it therefore is not subject to the statutes governing SDCs. The county argues alternatively that, even if the TIF is subject to those statutes, petitioner's challenge is time-barred. Finally, the city argues that, in all events, the TIF complies with the methodology required by ORS 223.304(2) and that petitioner's challenge therefore fails on the merits.

The threshold issue is whether the TIF is subject to the statutes governing SDCs. *See* ORS 223.297 to ORS 223.314. The express purpose of that statutory scheme is "to provide a uniform framework for the imposition of system development charges by governmental units for specified purposes and to

---

[7] The statutes have been amended since this case arose in ways not pertinent to this case. *See* Or Laws 2001, ch 662, §§ 2-6 and Or Laws 1999, ch 1098, § 2. We cite the pre-amendment versions of the relevant statutory provisions.

establish that the charges may be used only for capital improvements." ORS 223.297. SDCs are defined as: "[A] reimbursement fee, an improvement fee or a combination thereof assessed or collected at the time of increased usage of a capital improvement or issuance of a building permit or connection to the capital improvement." ORS 223.299(4)(a). A reimbursement fee is a fee for "costs associated with capital improvements already constructed or under construction." ORS 223.299(3). An improvement fee is a fee for "costs associated with capital improvements to be constructed." ORS 223.299(2). "Capital improvements" refers to facilities or assets used for specified purposes, such as water supplies, waste water collection, and transportation. *See* ORS 223.299(1). Finally, in addition to describing what is included in the term "system development charge," the statutory scheme also specifies what is not included. For example, fees assessed or collected by local improvement districts are expressly excluded, as are the costs of complying with requirements or conditions of land use decisions. ORS 223.299(4)(b).

In light of the plain language of those definitions, we agree with petitioner that the TIF at issue in this case qualifies as an "improvement fee." It is a charge for costs associated with a future capital improvement (*i.e.*, transportation infrastructure). The charge, moreover, is assessed or collected when a development permit issues (subject to provisions to defer payment). The TIF, quite simply, squarely fits what the statutes describe.

In arguing to the contrary, respondents focus on the fact that the ordinance, although it terms the collection a "traffic impact fee," otherwise refers to it as a tax. *See, e.g.*, WCC § 3.17.010 (entitling the chapter the "Washington County traffic impact fee ordinance"); WCC § 3.17.030 (defining "fee" to mean "the traffic impact tax adopted herein"). But nothing in the statutory scheme suggests that the label given

to a particular charge is significant in determining whether it qualifies as a SDC. Rather, the statutes describe the charges they govern in substantive terms—that is, by the types of capital improvements, past or future, that the charges fund (*e.g.*, transportation improvements), and by the process by which the assessment is made (*e.g.*, in connection with issuance of a development permit). The legislature deemed it appropriate to exempt some charges, such as costs for compliance with land use conditions, that might otherwise fit the statute's definitions. The legislature, however, provided no such exemption for local "taxes" assessed against new development to fund the cost of capital improvements necessitated by such development. To the contrary, the legislature expressly declared its goal of establishing a "uniform framework" for imposition of systems development charges, a goal that would be undermined if labels, rather than substance, determined the statutory scheme's reach. We therefore conclude that the statutes pertaining to SDCs apply to the TIF.

The next question is whether, as the respondent county argues, petitioner's claim that the TIF is invalid under the statutes is time barred. In that regard, petitioner's only argument under the statutory scheme is that the TIF does not comply with ORS 223.304(2), which provides, in part:

> "Improvement fees shall be established by ordinance or resolution setting forth a methodology that considers the cost of projected capital improvements needed to increase the capacity of the systems to which the fee is related."

Petitioner's position is that, to comply with the methodology required by that provision, the funds collected from a particular developer must be used to address the specific impacts of the proposed development, rather than to finance jurisdiction-wide improvements to increase the capacity of

the affected systems more generally. According to petitioner, the funds collected through the TIF do the latter, not the former, and the TIF therefore is invalid.

We agree with the respondent county that petitioner's challenge in that regard is untimely. ORS 223.304(5) provides:

> "No legal action intended to contest the methodology used for calculating a system development charge shall be filed after 60 days following adoption or modification of the system development charge ordinance or resolution by the local government."

Petitioner does not suggest that its challenge is something other than one to the methodology used for calculating the TIF or that the 60-day time limitation does not by its terms apply. Instead, petitioner argues only that the limitation should not be enforced in this instance because, until petitioner sought a development permit, it had no incentive to bring its challenge. But the statute contains no exceptions. Nor does petitioner challenge the validity of the statute imposing a time limitation on such challenges. Petitioner appears merely to invite us to decline to apply the statute to it on policy grounds. We have no authority to do so. Consequently, the circuit court correctly rejected petitioner's statutory challenge.

III. PETITIONER'S TAKINGS CLAIM

We next consider petitioner's argument that the TIF is an uncompensated taking of its property, in violation of the federal constitution's Takings Clause. In resolving that claim, we begin by addressing respondents' preliminary assertion that the TIF is not subject to a Takings Clause analysis because it is a tax.

Respondents are correct that, generally, the Takings Clause does not apply to taxes. *See Penn Central Transp. Co. v. New*

York City, 438 U.S. 104, 124, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978) (the taxing power is "one obvious example" of an exercise of government power that affects property or economic interests without giving rise to takings claims); *see also Individuals for Responsible Government, Inc. v. Washoe County*, 110 F.3d 699, 704 (9th Cir 1997), *cert den*. 522 U.S. 966, 139 L. Ed. 2d 315, 118 S. Ct. 411 (1997) (holding that a recycling service charge was analogous to a property tax and therefore not subject to challenge as a taking of property). In contrast, special assessments or user fees for services, such as improvements to community infrastructures, have "traditionally been 'deemed to be part of the police power and not of the power of taxation.'" *Scappoose Sand and Gravel, Inc. v. Columbia County*, 161 Ore. App. 325, 333, 984 P.2d 876, *rev den* 329 Or 528, 994 P.2d 129 (1999) (citing *Sproul v. State Tax Com.*, 234 Or 579, 591, 383 P.2d 754 (1963)). Thus, user fees, assessments, and similar collections at least potentially are subject to takings analysis. *See, e.g., United States v. Sperry*, 493 U.S. 52, 60, 110 S. Ct. 387, 107 L. Ed. 2d 290 (1989) (takings analysis applied to fees used to defray the federal government's expenses in providing a claims tribunal).

We decline to resolve petitioner's constitutional challenge on the basis that the TIF qualifies as a tax, however, for two reasons. First, the TIF has characteristics of both a tax and a special assessment or similar fee and therefore defies ready classification as either. Traditionally, taxes and assessments have been distinguished as follows:

> "In the most general sense, a tax is 'any contribution imposed by government upon individuals, for the use and service of the state, whether under the name of toll, tribute, tallage, gabel, impost, duty, custom, excise, subsidy, aid, supply, or other name.' Black's Law Dictionary 1457 (6th ed 1991). An assessment is a government fee imposed on owners of property to finance

> improvements or services directly benefitting that property; an assessment is exempt from constitutional limitations requiring that taxes be uniformly imposed so long as the financial burden and the private benefit are closely related. *King v. Portland*, 38 Or 402, 63 Pac 2 (1900), *aff'd* 184 U.S. 61, 22 S. Ct. 290, 46 L. Ed. 431 (1902)."

Automobile Club of Oregon v. State of Oregon, 314 Or 479, 485-86, 840 P.2d 674 (1992) (footnote omitted). The TIF at issue in this case is fee-like in that it is collected only from persons whose activities give rise to a need for government to exercise its power to build, expand, or improve the transportation facilities of the community. *See generally Sproul*, 234 Or at 592-93 (when the cost of a governmental expense is to be paid only by persons causing government to incur the expense, limitations on governmental taxing authority do not apply). On the other hand, the TIF is spent in ways that make it more like a tax. That is, the collections are pooled into a fund that is used to serve the general public by improving the capacity of city streets and arterials within the jurisdiction generally. The funds are not spent only or necessarily on improvements that are directly tied to the developed property, such as, for example, improving the access from the development to the adjacent street. The TIF thus has a hybrid quality.

Second, any resolution based on the parties' tax-versus-fee debate would not be responsive to petitioner's argument, which is that the characterization does not matter. What matters, according to petitioner, is that the government took petitioner's property (here, money) as a condition for developing petitioner's land. Petitioner views Dolan as subjecting any such monetary exaction, whether considered a tax or a fee, to an individualized "rough proportionality" analysis under the federal Takings Clause. Consequently, even were we to characterize the TIF as a tax, that characterization

would not meet petitioner's challenge. We must, in all events, examine the Supreme Court's Takings Clause jurisprudence and the extent to which the holding in Dolan applies to the assessment at issue in this case. We therefore turn to that examination.

Federal Takings Clause Jurisprudence

At the outset, it is helpful to clarify the nature of the collection that petitioner seeks to invalidate in this case. The challenged TIF, whether deemed a tax or a form of assessment, unquestionably is what in land use parlance is termed an "impact" or "development" fee. Local governments and municipalities often impose such charges on developers as a condition of zoning changes, building and development permits, or other governmental approvals necessary for new and, generally, more intensified development to occur. As described in one academic treatment of the subject:

> "Exactions can take various forms, including in-kind dedications for infrastructure, such as roads, parks, and schools, and 'in lieu' fees for the same purpose. Exactions also include impact fees, or special assessments, to cover the cost of development. The main goal of the imposition of exactions is 'to shift to the developer the costs of the public infrastructure that the development requires.' Essentially, exactions force developers to internalize the 'external cost' they impose on the surrounding community."

Abraham Bell and Gideon Parchomovsky, Givings, 111 Yale LJ 547, 609 (2001) (footnotes omitted). The TIF's character as an exaction is what gives rise to the particular legal dispute in this case.

Exactions do not fit neatly within the more conventional Takings Clause analytical construct. Traditionally, takings jurisprudence has distinguished between two kinds of encroachments on property interests, with significantly different

analyses applicable to each. The first is an actual physical invasion or occupation of property, whether in the form of a physical trespass or a forced dedication, as a result of which some portion of the property may be used by others. The Fifth Amendment is particularly protective of property against that form of encroachment, and physical invasions or diminutions of rights of exclusive possession have been deemed to be per se takings that entitle a property owner to compensation. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982). Such an invasion is unconstitutional "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Id.* at 434-35.

The same is not true, however, of the second traditionally recognized type of government encroachment on property interests, namely, regulatory restrictions on property uses (e.g., zoning). In testing use restrictions, no "set formula" determines whether an unconstitutional taking has occurred. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992). Instead, a court must engage in an essentially ad hoc, factual inquiry that considers whether the land use regulation "substantially advances legitimate state interests" and "does not deny an owner economically viable use of his land." *Agins v. Tiburon*, 447 U.S. 255, 260, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980); *see also Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 704, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999) (land use regulations are tested under the Takings Clause to determine whether they are reasonably related to legitimate public interests). Thus, when the government regulates property without physically occupying it, the Takings Clause is much less protective of the interests of the property owner and much more deferential to the public interests served.

Dolan, and the case that foreshadowed it, *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987), were decided against that landscape.

Both cases involved development conditions that, in effect, required the landowner to forfeit part of his or her property in exchange for approval to develop. The Court therefore was confronted with a blend of the governmental encroachments described above. On the one hand, the challenged government action involved a regulatory use restriction in the form of a restriction on further development. Traditionally, such a restriction would have triggered a lenient takings standard. On the other hand, as a condition of relaxing the use restriction, the government required the property owner to suffer a physical occupation or invasion. Traditionally, such an invasion would have been considered a per se taking. The issue for the Court was how to test that amalgamation.

The facts of the cases provide context that is helpful to understanding the Court's resolution of that issue. In *Nollan*, the plaintiffs sought approval from a California agency to rebuild a beachfront house. The agency granted the approval, subject to the condition that the plaintiffs dedicate a public easement behind their house, along the shore, so that the public could pass freely between the two public beaches bordering the plaintiffs' property. In invalidating the dedication, the Court accepted as legitimate the agency's concern that the house that the plaintiffs proposed to build would block visual access to the beach and create a "psychological barrier" to its use by the public. But the Court considered the requirement of a public easement behind the house to be unrelated to that interest, because it did nothing to enhance visual access of the beach from the street or to overcome any psychological barrier. Instead, the easement merely facilitated use of the public beaches by people already aware of and using them. The Court concluded that the dedication therefore lacked an "essential nexus" between the condition imposed and the government interest in imposing it, which rendered the dedication a taking. *Id.* at 841-42. In short, although the Court declined to deem the condition a per se taking as it had for other physical invasions or dedications of property

interests, the Court required that there be a logical connection between the governmental interest to be served and the particular condition imposed on the landowner.

There was, however, a second shoe to drop, and the Court signaled as much in *Nollan*. In *Nollan*, because the Court determined that no connection existed between the dedication and the government's interest in imposing it, the Court did not have to decide how close a nexus is required between the two to avoid an unconstitutional taking; it therefore identified the issue but declined to resolve it. *Id.* at 838. Several years later, the Court granted certiorari in *Dolan* for the express purpose of settling that unresolved issue. 512 U.S. at 377.

In *Dolan*, the property owner sought to double the size of her retail store and to pave her parking lot. As a condition of allowing the development, the city required the owner to dedicate a 15-foot strip of land for use as a pedestrian path and bikeway and also to dedicate a portion of her property within the 100-year flood plain for a publicly accessible "greenway." The city defended the bikeway requirement with a calculation that the increased size of the retail store would add 937 car trips per week and that the bikeway "could" help to offset the increased traffic. The city defended the flood plain dedication on the basis that paving the gravel parking lot would increase the amount of impermeable ground, thus adding to flooding from the adjacent and already over-burdened creek. *Id.* at 379-82.

The Court, in examining the dedications, established a two-step inquiry for analyzing regulatory takings claims in the context of conditional use or development permits. First, as it had in *Nollan*, the Court examined whether there was an "essential nexus" between the conditions and legitimate governmental interests, such that the purpose to be served by the condition was the same as the government's interest in the use restriction. The Court found that nexus requirement readily satisfied. More specifically, the Court determined that

there was a logical relationship between relieving traffic congestion and requiring a bike path and between the increased risk of flooding due to the parking lot and requiring property within the local flood plain to remain undeveloped. 512 U.S. at 387-88.

Second, having determined that the "essential nexus" inquiry was satisfied, the Court turned to the degree of connection between the dedications and the projected impact of the proposed development. *Id.* at 388. The Court began by endorsing the predominant test developed by state courts—*i.e.*, the requirement of a "reasonable relationship" between the condition imposed and the impacts of the development. That test, the Court reasoned, best "encapsulated" what the federal Takings Clause requires. *Id.* at 391. The Court, however, adopted the phraseology "rough proportionality" to avoid confusion with "rational basis" scrutiny, which the Court viewed as appropriate for equal protection rather than takings analysis. *Id.* Thus, the Court held that there must be "rough proportionality" between a development's projected impacts and the exactions required of the property owner as a condition of development. *Id.* The Court emphasized that it was requiring proportionality of only an approximate kind: "No precise mathematical calculation is required, but the city must make some effort to quantify its finding in support of the dedication * * * beyond the conclusory statement that it could offset some of the [impacts of the development]." *Id.* at 395-96. But the government "must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* at 391 (emphasis added). Moreover, the Court made clear that it was departing from the general rule applicable to zoning and other use restrictions that the "burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights." *Id.* at 391 n 8. Instead, the burden was on the government "to justify the required dedication." *Id.*

Applying the "rough proportionality" prong of the test to the case before it, the Court concluded that the record in *Dolan* was insufficient to satisfy the government's burden. With respect to the dedication of the greenway, the Court observed that the city's interest in not overburdening the adjacent creek was served by keeping the flood plain free of development. But rather than just regulate petitioner's private use of that portion of the property, the city required her to dedicate it to public use as a greenway. The Court concluded that nothing in the record demonstrated any "individualized determination" of the development impacts that would support divesting the owner of her property, rather than regulating her use of it. *Id.* at 393-94. As for the bike and pedestrian pathway, the Court deemed the city's finding that the pathway could offset some of the traffic demand insufficiently precise to justify a dedication of some the landowner's property for public use. *Id.* at 395-96.

As we have observed in *Dolan*'s aftermath, the new obstacle posed to development conditions by *Dolan*'s "rough proportionality" test is not in the standard itself—which the Court viewed as similar to the familiar "reasonable relationship" test. Rather, that obstacle arises from the specificity required in analyzing the impacts of a particular proposed development and comparing them to the nature and extent of the exactions required as a condition of approving the development. *See Art Piculell Group v. Clackamas County*, 142 Ore. App. 327, 340, 922 P.2d 1227 (1996); *J.C. Reeves Corp. v. Clackamas County*, 131 Ore. App. 615, 620, 887 P.2d 360 (1994). *Dolan*'s test also is more rigorous for the government because it places the burden on the government in the first instance to justify the condition as sufficiently proportionate, rather than giving the property owner the initial burden to demonstrate the lack of the necessary relationship between the impacts of the development and the condition imposed. *See Schultz v. City of Grants Pass*, 131 Ore. App. 220, 225, 884 P.2d 569 (1994) (discussing the shift

of burden under Dolan). In departing from the less exacting requirements applicable to zoning and other traditional use regulations, the Court in Dolan explained:

> "Th[ose sort of land use regulations], however, differ in two relevant particulars from the present case. First, they involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. Second, the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city."

512 U.S. at 385. The Court defended placing the burden of justification on the government for related reasons:

> "Justice Stevens' dissent takes us to task for placing the burden on the city to justify the required dedication. He is correct in arguing that in evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights. Here, by contrast, the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. In this situation, the burden properly rests on the city."

Id. at 391 n 8 (citations omitted). Dolan's Application to Legislatively Imposed and Generally Applicable Development Fees—The National Landscape.

We have examined *Nollan* and *Dolan* in other cases that have come before us since the Court issued those decisions.[8] We have done so again in this case to highlight aspects of the decisions that have particular bearing on the issue before us.

---

[8] *See, e.g.*, 181 Ore. App. at (slip op at 28-31) (citing cases).

Both *Nollan* and *Dolan* arose in the context of discretionary adjudicative determinations specific to one development proposal on a particular parcel of land. Both, moreover, involved conditions that took the form of a dedication of property for public use. As the decision in each case reveals, those facts played an explicit part in the Court's rationale for adopting a heightened level of scrutiny for the development conditions at issue. But whether those facts are therefore an indispensable predicate for applying that scrutiny has been, and remains, unclear. The two questions that consequently have generated considerable litigation for lower courts are: (1) Does heightened scrutiny apply to nonpossessory exactions, such as development or impact fees like the TIF imposed in this case? (2) Does that scrutiny apply to exactions imposed through generally applicable legislation rather than individual adjudicative decisions?

In the eight years since *Dolan* was decided, no consensus has emerged among lower courts on those questions and, so far, the Supreme Court has declined to grant certiorari in cases that might have provided further guidance. *See, e.g., Parking Association of Georgia v. City of Atlanta*, 264 Ga 764, 450 S.E.2d 200 (1994), *cert den* 515 U.S. 1116 (1995) (*Dolan* does not apply to a development condition imposed through a legislative process rather than through individualized determinations); *Amoco Oil Co. v. Village of Schaumburg*, 661 N.E.2d 380, 277 Ill. App. 3d 926, 214 Ill. Dec. 526 (1995), cert den 519 U.S. 976, 136 L. Ed. 2d 325, 117 S. Ct. 413 (1996) (*Dolan* applies to legislatively imposed property development conditions). Lower court authority appears most sharply divided on the issue of *Dolan's* application to monetary exactions. Some courts have declared, seemingly categorically, that *Dolan* is limited to dedications of property and does not extend to nonpossessory exactions, such as the

payment of fees.[9] Other courts have rejected that view, holding that *Dolan* potentially can extend to monetary exactions, at least in some circumstances.[10] A similar split of authority exists in lower courts as to whether *Dolan* is limited to development conditions imposed through adjudicatory decisions or whether it extends to those imposed as a result of generally applicable legislation.[11]

The legislative-versus-adjudicative imposition of a development condition has proved especially significant for courts that have extended *Dolan's* heightened scrutiny test to monetary exactions. With near uniformity, lower courts applying

---

[9] *E.g., Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1578 (10th Cir 1995) (declining to apply *Dolan* to fees imposed on landowners as a condition of exercising their property right to hunt on their own land because no physical occupation is involved); *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872, 875-76 (9th Cir 1991), *cert den* 504 U.S. 931, 118 L. Ed. 2d 593, 112 S. Ct. 1997 (1992) (declining to extend holding in *Nollan* to purely monetary exaction); *McCarthy v. Leawood*, 257 Kan 566, 894 P.2d 836 (1995) (concluding that nothing in *Dolan* supports making the critical leap from property dedications to impact fees).

[10] *E.g., Home Builders Association of Central Arizona v. City of Scottsdale*, 187 Ariz 479, 930 P.2d 993, *cert den* 521 U.S. 1120, 138 L. Ed. 2d 1015, 117 S. Ct. 2512 (1997); *Ehrlich v. City of Culver City*, 12 Cal 4th 854, 50 Cal.Rptr.2d 242, 911 P.2d 429, *cert den* 519 U.S. 929, 136 L. Ed. 2d 218, 117 S. Ct. 299 (1996); *Krupp v. Breckenridge Sanitation Dist.*, 19 P3d 687 (Colo 2001); *Town of Flower Mound v. Stafford Estates Ltd. Partnership*, SW 3d (Tex App February 14, 2002); *Benchmark Land Co. v. City of Battle Ground*, 103 Wash. App. 721, 14 P3d 172 (2000), *rev allowed* 143 Wn. 2d 1018 (2001).

[11] *See generally Parking Ass'n of Georgia, Inc. v. City of Atlanta*, 515 U.S. 1116, 115 S. Ct. 2268, 132 L. Ed. 2d 273 (1995) (Thomas, J., dissenting from denial of certiorari) (collecting lower court cases in conflict); *Garneau v. City of Seattle*, 147 F.3d 802, 811 (9th Cir 1998) (there is "considerable doubt" about the applicability of the *Dolan* rough proportionality test to "legislative, as opposed to administrative exactions" and to "fee exactions, as opposed to physical exactions").

Dolan to monetary exactions have done so only when the exaction has been imposed through an adjudicatory process; they have expressly declined to use *Dolan's* heightened scrutiny in testing development or impact fees imposed on broad classes of property pursuant to legislatively adopted fee schemes. The California Supreme Court's decision in *Ehrlich v. City of Culver City*, 12 Cal 4th 854, 50 Cal.Rptr.2d 242, 911 P.2d 429, *cert den* 519 U.S. 929, 136 L. Ed. 2d 218, 117 S. Ct. 299 (1996), together with its more recent decision in *San Remo Hotel v. City and County of San Francisco*, 27 Cal 4th 643, 117 Cal.Rptr.2d 269, 41 P3d 87 (2002), provides one of the more in-depth and thoughtful discussions of the reason for that distinction.

Erhlich involved a development permit for a condominium complex to be built on the site of a former private tennis club. As a condition for the permit, the city required the owner to pay a $ 280,000 fee to be used for city development of recreational facilities. Although the court was divided on some points, a majority held that the fee was subject to *Dolan's* heightened scrutiny test. The plurality decision emphasized that the city had exercised discretionary power in imposing and calculating the fee, rather than doing so pursuant to a legislative mandate or formula. Thus, even though the condition involved the payment of money rather than a dedication of land, the fee had the same potential for illegitimate leveraging that was central to the Court's rationale in *Dolan*. *Ehrlich*, 911 P.2d at 438. The plurality reasoned:

> "There is no question that the takings clause is specially protective of property against physical occupation or invasion—a proposition that the court's opinion in *Loretto* * * * makes clear. It is also true, as the city points out, that government generally has greater leeway with respect to noninvasive forms of land use regulation, where the courts have for the most part given greater deference to its power to impose broadly

> applicable fees, whether in the form of taxes, assessments, user or development fees. [Representative cases] dealt with such legislatively formulated development assessments imposed on a broad class of property owners. Fees of this nature may indeed be subject to a lesser standard of scrutiny than that formulated by the court in *Nollan* and *Dolan* because the heightened risk of the 'extortionate' use of the police power to exact unconstitutional conditions is not present. Nonetheless, we reject the proposition that *Nollan* and *Dolan* are entirely without application to monetary exactions. When such exactions are imposed—as in this case—neither generally nor ministerially, but on an individual and discretionary basis, we conclude that the heightened standard of judicial scrutiny in *Nollan* and *Dolan* is triggered."

911 P2d. at 443-44 (emphasis in original).

Justice Mosk, concurring, observed that development fees calculated according to "preestablished legislative formulae based on square footage or per unit of development" bear a close resemblance to excise taxes, assessment fees, and user fees that are tested pursuant to standards that are deferential to the authority of government to impose them. But Justice Mosk agreed with the plurality that *Dolan's* more exacting scrutiny should apply because the disputed fee was not legislatively imposed:

> "[The risk of extortionate behavior on the part of government] diminishes when the fee is formulated according to preexisting statutes or ordinances, which purport to rationally allocate the costs of development among a general class of developers or property owners—indeed, as discussed above, the separation of powers doctrine clothes such a fee in a presumption of constitutionality. But when the fee is ad hoc, enacted at the time the development application was approved,

> there is a greater likelihood that it is motivated by the desire to extract the maximum revenue from the property owner seeking the development permit, rather than on a legislative policy of mitigating the public impacts of development or of otherwise reasonably distributing the burden of achieving legitimate government objectives."

911 P2d. at 459-60 (Mosk, J., concurring); 911 P2d. at 465 (Kennard, J., concurring and dissenting) (*Dolan* should apply to the recreation fee because that fee was imposed on the development application individually rather than pursuant to an ordinance or rule of general applicability).

In its more recent decision in *San Remo Hotel*, the California Supreme Court had its first opportunity to authoritatively address the analysis that should apply to a development fee imposed through a generally applicable legislative enactment. The case involved a challenge to a housing replacement fee imposed on hotel owners who proposed to alter the use of their property by renting rooms to tourists or other daily renters, rather than to longer-term residents. If the developer did not want to construct or otherwise bring onto the market alternative housing units, the developer could pay an "in lieu" fee that would help fund government construction of low- and moderate-income housing. *San Remo Hotel*, 41 P3d at 92. Adhering to the distinction it drew in *Erhlich*, the court observed that the sine qua non for application of *Dolan's* heightened scrutiny test was the discretionary deployment of the police power in the imposition of land use conditions in individual cases. 41 P3d. at 105. But the fee in dispute did not qualify as a discretionary condition. Rather, it was one in which "no meaningful government discretion entered into either the imposition or the calculation of the in lieu fee." *Id.* at 104. In particular, because the fee was mandatory for any developer proposing such a conversion who chose not to provide replacement housing, the developer in *San Remo* was not "singled out" for payment of the fee. *Id.*

Nor was the amount of the fee discretionary, because it was determined according to a set formula based on replacement cost, which in turn was based on independent appraisals. *Id.* Thus, the court held, *Dolan* did not apply.

As earlier noted, lower courts extending *Dolan* to development fees almost uniformly have followed the distinction identified in *Erhlich* and *San Remo Hotel*, thus limiting *Dolan* to monetary exactions that are imposed and calculated on a discretionary and adjudicatory basis. *See Home Builders Association of Central Arizona v. City of Scottsdale*, 187 Ariz 479, 486, 930 P.2d 993, *cert den* 521 U.S. 1120, 138 L. Ed. 2d 1015, 117 S. Ct. 2512 (1997); *Krupp v. Breckenridge Sanitation Dist.*, 19 P3d 687, 698 (Colo 2002); *Waters v. Montgomery County*, 337 Md 15, 650 A.2d 712, 724 (1994); *Town of Flower Mound v. Stafford Estates Ltd. Partnership*, SW 3d (Tex App February 14, 2002). The only case we have identified that explicitly has extended heightened scrutiny to a generally applicable legislatively imposed development fee is *Home Builders Ass'n of Dayton v. City of Beavercreek*, 89 Ohio St 3d 121, 729 N.E.2d 349 (2000).[12] Whether the court in that case actually applied heightened scrutiny, however, is questionable.[13]

---

[12] Although petitioner also relies on the decision of the Washington intermediate appellate court in *Benchmark Land Co.*, that case is not helpful authority. It is unclear from the opinion whether the challenged development fee was imposed pursuant to an individualized process or whether it was legislatively mandated and nondiscretionary. The court does not discuss the distinction. The court's opinion merely describes the fee as having been imposed in the course of the city's issuance of a development permit; nothing suggests that the fee is part of a comprehensive, detailed, and nondiscretionary legislative conditioning process. *See Benchmark Land Co.*, 14 P3d at 172-73.

[13] The Home Builders Ass'n of Dayton, decision, although stating that *Dolan* should apply, did not seem to adhere to that test in its analysis. The court determined that the first prong of the *Nollan/Dolan* test ("essential nexus") was satisfied by a showing that the "methodology" used to

Oregon Jurisprudence and Analysis of the TIF

Our own cases have sorted through some, but not all, of the questions left unanswered by the Court's decisions in *Nollan* and *Dolan*. In particular, we have been called on to decide whether heightened scrutiny should be extended to legislatively authorized dedication requirements. The first of those cases was *Schultz*, in which a local ordinance authorized and required dedications in exchange for development permits. The city argued that the legislative authorization for the dedications distinguished them from those imposed in *Dolan*. In rejecting that argument, we first observed that the petitioners were not challenging the validity of a "legislative or quasi-legislative enactment that is applied generally to all similarly situated properties" but were, instead, challenging imposition of a particular set of conditions applied to their particular property. *Schultz*, 131 Ore. App. at 227. In other words, we appear to have suggested that there were

---

determine the need for a traffic impact fee was based on "generally accepted traffic engineering practices." *Home Builders Ass'n of Dayton*, 729 N.E.2d at 356. The court determined that the second prong of the test ("rough proportionality") was satisfied by the existence of a "reasonable relationship" between "the fee paid and the benefits accruing to developers." *Id.* at 358 (emphasis added). The court made no individualized assessment of proportionality at all but instead reviewed the legislation from a facial perspective as it applied to developers generally. The court's analysis is difficult to square with *Dolan* and, in fact, mirrors the more deferential test traditionally used for user fees and other purely monetary assessments. *See, e.g., Sperry*, 493 U.S. at 60-66 (fee charged to support a government service is not tested for proportionality in specific individual cases but must simply be a "fair approximation of the cost of benefits" provided by the government-funded program that the fee supports); *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 163, 101 S. Ct. 446, 66 L. Ed. 2d 358 (1980) (similar holding).

significant discretionary aspects to the land use decision in that case. We further observed:

> "[Even if the city is correct that the decision to impose the conditions is a legislative one,] the character of the restriction remains the type that is subject to the analysis in *Dolan*. In drawing its distinction between the legislative land use decisions that are entitled to a presumption of validity and the exactions that are not, the Supreme Court noted that what triggers the heightened scrutiny of exactions is the fact that they are 'not simply a limitation on the use' to which an owner may put his or her property, but rather a requirement that the owner deed portions of the property to the local government. That is precisely the nature of the exaction imposed by the city in this case."

Id. (emphasis added; citation to *Dolan* omitted). Thus, our resolution was predicated explicitly on the nature of the condition involved in that case, namely, a physical occupation of property in the form of a dedication of property. We have since adhered to that position, at least in the context of property dedications that, although legislatively authorized, have involved discretion in determining the actual nature and scope of the condition to be imposed. *See J.C. Reeves Corp.*, 131 Ore. App. at 623-24, 623 n 1. We also have since reserved the question of whether we would reach the same conclusion for dedications imposed pursuant to legislatively adopted criteria that are "sufficiently detailed and uniformly applied to obviate" *Dolan's* concerns about ad hoc exactions. *McClure v. City of Springfield*, 175 Ore. App. 425, 435 n 6, 28 P3d 1222 (2001).

In *Clark v. City of Albany*, 137 Ore. App. 293, 904 P.2d 185 (1995), *rev den* 322 Or 644, 912 P.2d 375 (1996), we also held that monetary exactions can be subject to heightened scrutiny under *Dolan*. In *Clark*, a city required a developer, as part of a site approval process for construction

of a fast-food restaurant, to restrict his use of the developed property in certain ways and to make improvements to the site as well as to property adjacent to the site. We concluded that "not all conditions of approval come within the ambit of the *Dolan* test" and we held, in particular, that conditions requiring traffic-free areas on the site and site modifications (such as meeting storm drainage requirements) were use regulations, not exactions subject to *Dolan*. *Clark*, 137 Ore. App. at 300, 301-02. We reached an opposite conclusion, however, with respect to the condition that the developer fund adjacent street improvements. We explained:

> "For purposes of takings analysis, we see little difference between a requirement that a developer convey title to the part of the property that is to serve a public purpose, and a requirement that the developer himself make improvements on the affected and nearby property and make it available for the same purpose. The fact that the developer retains title in, or never acquires title to, the property that he is required to improve and make available to the public, does not make the requirement any the less a burden on his use and interest than corresponding requirements that happen also to entail memorialization in the deed records."

Id. at 300. Thus, *Clark* became authority for the proposition that monetary exactions, as well as dedications, could be subject to *Dolan's* heightened scrutiny test.[14]

---

[14] *Clark*, however, did not necessarily settle the question of whether a requirement to pay money in exchange for a development permit or other approval necessarily falls within the range of exactions subject to analysis under *Dolan*. A few years after we decided *Clark*, the Supreme Court issued its decision in *Del Monte Dunes at Monterey, Ltd.*, which involved a development denial, rather than a permit conditioned on either a monetary exaction or dedication of property. In its opinion, the Court refused to subject the denial to *Dolan's* heightened scrutiny test, cautioning that it had not "extended the rough-proportionality test of

But *Clark* involved an ad hoc adjudicatory imposition of a monetary exaction, not a generally applicable and legislatively imposed development fee. We therefore did not have the occasion in *Clark* to consider or decide whether *Dolan* extends to any and all monetary assessments imposed as part of a development approval, nor did we purport to make such a global holding. To the contrary, we held only that the adjacent street improvements required in that case were subject to *Dolan*, while also expressly cautioning as part of that holding that the case was otherwise "not the appropriate one for universal line-drawing." *Id.*[15]

Dolan beyond the special context of exactions—land use decisions conditioning approval of development on the dedication of property to public use." 526 U.S. at 701 (emphasis added). Other courts have noted the Court's comment and, because of it, have either declined or expressed reluctance to apply Dolan's analysis to exactions that do not involve property dedications. *See, e.g., Clajon*, 70 F.3d at 1578; *Krupp*, 19 P3d at 698. This is not an appropriate case to reexamine *Clark* in light of City of Monterey or other later jurisprudential developments because this case can be resolved on the more narrow ground of whether *Dolan* correctly extends to generally applicable legislatively imposed development fees.

[15] Our decisions in *Lincoln City Chamber of Commerce v. City of Lincoln City*, 164 Ore. App. 272, 991 P.2d 1080 (1999), *rev den* 330 Or 331 (2000), and Art Piculell Group also applied *Dolan* to zoning ordinances requiring developers to agree to dedications and other exactions as conditions of development. The challenge in *Lincoln City Chamber of Commerce* was a narrow one: whether the city could place the burden on the developer to submit an engineering report addressing proportionality issues. Although we did not explicitly address *Dolan's* application to legislatively authorized monetary exactions, we did observe that the conditions authorized by the ordinance were subject to *Dolan* because they were imposed pursuant to an individualized adjudicative process. *Lincoln City Chamber of Commerce*, 164 Ore. App. at 277-78. We did not discuss the legislative/adjudicative distinction at all in *Art Piculell Group*, but our description of the conditions imposed in that case makes clear that the process involved was adjudicatory and ad hoc in nature. 142 Ore. App. at 329-30.

This case therefore presents us with the first opportunity to consider whether development or impact fees, when imposed on broad classes of property and when calculated pursuant to a legislatively set formula, are subject to *Dolan's* heightened scrutiny test. In that regard, petitioner asserts that the TIF is imposed through an ad hoc adjudicatory process. But petitioner does not explain how that is so, nor does the legislative scheme itself support petitioner's assertion.

To the contrary, by the terms of the ordinance, imposition of the TIF is mandatory on "all development in the county, including inside cities," subject to only a few specified exceptions (*e.g.*, remodeling of single- and multi-family structures and remodeling of commercial, business, and industrial structures in ways that do not generate additional average weekday trips). *See* WCC § 3.17.040(B). Appendix A to the ordinance, which lists the land use categories to which the TIF applies, consists of more than 110 specifically identified uses falling under the more general headings of residential, institutional, business and commercial, and office uses. The list, while perhaps not exhausting the full universe of possible land uses, at the least is very comprehensive. For example, residential uses include single-family detached housing, retirement communities, mobile homes, and different categories of apartment and condominium complexes. Institutional uses span too large a group to canvass here. To give only a few examples, however, they encompass such things as waterways, marinas, railroad terminals, airports, theaters, camps, schools, dog/horse/auto race facilities, churches, nursing homes, hospitals, military bases, and courts. Business and commercial uses are likewise too numerous to list here. But they include hotels, retail stores, specialty retail stores, stores that sell particular products (*e.g.*, lumber, apparel, tires, hardware/paint, and so on), shopping centers based on overall size, restaurants of various kinds, car washes, car dealerships, service stations, and even video arcades. Finally, office uses encompass, among others,

clinics, general office space (based on size), medical offices, insurance office, industrial parks, warehouse facilities, federal post facilities, and utility offices. *See generally* WCC ch 3.17, Appendix A.

For each listed use, the ordinance specifies the "basis for trip determination" (BTD) that applies. Thus, as examples, the BTD for a utility office is the number of employees; for a service station, it is the number of pumps; for a nursing home, it is the number of beds; for a school, it is the number of students; for single family housing, it is the number of units of housing; for a movie theater, it is the number of parking spaces provided; for a city park, it is acreage; for a commercial shopping center, it is gross leasable square footage. *Id.*

Finally, the ordinance expressly sets the fee amount charged for each trip that the development potentially can generate. Residential, office, and industrial developments are charged $135, $124 and $130, respectively, per average weekday trip. Business and institutional developments are charged $34 and $56, respectively, per average weekday trip. WCC § 3.17.050(A).[16]

As that overview of the TIF ordinance reveals, no significant discretion is involved in the TIF's imposition or calculation. Imposition of the TIF is mandatory on broad classes of property. Indeed, nearly all proposed development that conceivably would burden the street and arterial infrastructure within the county is subject to the mandatory

---

[16] As earlier noted, the rates increased after petitioner pursued its initial administrative appeal. The significance of the rates, and the point of our citation to them, is not their actual dollar amount but the degree to which the ordinance itself sets the basis for calculation of the TIF rather than having it depend on an adjudicatory exercise of discretion.

fee. Calculation of the fee is, likewise, nondiscretionary.[17] To be sure, because different uses vary in the burden they place on street and arterial infrastructure, the legislation uses a classification scheme to adjust the fee based on those differences. Such classification is common for any number of generally applicable legislative tax, fee, and other assessments; legislative classifications do not render the scheme adjudicatory or discretionary. The TIF ordinance is, in short, precisely the kind of detailed and uniformly applied legislative assessment scheme that courts in other states hold does not fall within the express reach or the implicit rationale of Dolan's heightened scrutiny test.

The only remaining question, then, is whether we agree with those courts. We do. In our view, the reasoning set out by the California Supreme Court in its opinions in *Erhlich and San Remo Hotel*, which we described earlier, is

---

[17] An element of discretion can enter into the calculation of the TIF if the proposed development does not fall into one of the use categories listed in section 3.17.050, Appendix A, a situation that is not implicated here. In that circumstance, the director of the department of land use and transportation (or a city officer designated to administer the TIF) is directed to base the TIF on the use or uses listed in Appendix A that are most similar in traffic generation to the use proposed by the developer. WCC § 3.17.050(B)(1). At the developer's election and expense, the director may alternatively consider actual trip generation information as verified by a registered traffic engineer. In that circumstance, the director then may adjust the basis for calculating the fee, considering the "location, size and other appropriate factors in determining the average weekday trip." WCC § 3.17.050(B)(2). Again, this case does not involve a use that does not fit within one or more of those specified in Appendix A, and the director's discretion in that regard is not implicated. We therefore need not determine whether the nature of that discretion is sufficiently channeled by objective criteria, including the engineering evidence that the developer itself provides, that it avoids the kind of ad hoc adjudicatory decision that troubled the Court in *Dolan*. *See San Remo Hotel*, 41 P3d at 104 (fact that in lieu fee involved calculation on the basis of real estate appraisals did not render it discretionary or ad hoc).

persuasive. As our own discussion of *Nollan/Dolan* highlights, and as *Erhlich* and *San Remo Hotel* accurately observe, the two-pronged heightened scrutiny that the Court adopted in *Dolan* was animated by the Court's particular concern with the sort of governmental leveraging that can arise in case-by-case adjudicatory imposition of development conditions. The Court also was expressly concerned with the nature of the conditions imposed—i.e., dedications of property to public use. The nature of the exaction involved here—a monetary assessment in the form of a traffic impact tax or fee—coupled with its imposition and calculation through a detailed legislative formula meaningfully distinguishes this condition from those in *Nollan/Dolan*. As the court in *San Remo Hotel* recognized:

> "While legislatively mandated fees do present some danger of improper leveraging, such generally applicable legislation is subject to the ordinary restraints of the democratic political process. A city council that charged extortionate fees for all property development, unjustifiable by mitigation needs, would likely face widespread and well-financed opposition at the next election. Ad hoc individual monetary exactions deserve special judicial scrutiny mainly because, affecting fewer citizens and evading systematic assessment, they are more likely to escape such political controls.
>
> "* * * * *
>
> "Finally, we should not lose sight of the constitutional background. To put the matter simply, the taking of money is different, under the Fifth Amendment, from the taking of real or personal property. The imposition of various monetary exactions—taxes, special assessments, and user fees--has been accorded substantial judicial deference."

41 P3d at 105-06 (Mosk, J., concurring) (internal quotation marks omitted) (citing *Ehrlich*, 911 P.2d at 429)).

We agree with that reasoning and adopt it. We also agree with the concurring opinion in *Erhlich*, which rhetorically observed that there would be little sense in using a deferential standard of review for taxes and other general assessments, while simultaneously using a more exacting standard for development fees that differ only in how they are spent:

> "If a municipality can constitutionally impose a development tax as long as it is rationally based, why is a higher level of constitutional scrutiny required when, as in the case of generally applicable development fees, the 'tax' is earmarked for use in alleviating specific development impacts rather than for the general fund?"

Erhlich, 911 P.2d at 455 (Mosk, J., concurring) (emphasis added). Our response is equally rhetorical: Why indeed? There is no principled basis on which to distinguish generally applicable development fees that fund the infrastructure expansion needed to support new development from other legislatively imposed and generally applicable taxes, assessments, and user fees. We therefore join the several courts in other jurisdictions that have held that *Dolan* does not apply to such legislatively imposed and calculated development fees.

That conclusion resolves petitioner's constitutional challenge in this case. Petitioner's only argument is that the TIF is a taking because the city did not make a sufficiently individualized determination of the traffic impacts that would be generated by his particular development proposal. Because we hold that the more exacting scrutiny required under *Dolan* does not apply to the TIF, no individualized determination was necessary. Petitioner does not challenge the TIF on any other takings theory and, consequently, the trial court properly dismissed the writ.

IV. CONCLUSION

To review, we reject petitioner's statutory as well as its constitutional challenges to the imposition of the TIF in this case. Regarding petitioner's statutory challenge, we agree

with petitioner that the TIF qualifies as a system development charge (SDC) and that it therefore generally must comply with the provisions of ORS chapter 223 governing such charges. Petitioner's only statutory challenge is that the TIF does not comply with the requirement in ORS 223.304(2) that SDCs be calculated using "a methodology that considers the cost of protected capital improvements needed to increase the capacity of the systems to which the fee is related." That challenge is barred by ORS 223.304(5), which requires that it have been brought within 60 days after the adoption or modification of the TIF ordinance.

Regarding petitioner's federal takings claim, our prior cases have held that monetary exactions imposed through ad hoc adjudicatory challenges can be subject to *Dolan's* heightened scrutiny, as can be legislatively authorized dedications of property. But the prior cases presenting those issues all have involved authorizing legislation that left significant discretion in the identification and imposition of the particular conditions to be applied to individual development proposals. Until this case, we have not had the opportunity to authoritatively resolve whether *Dolan* also extends to a generally applicable development fee imposed on a broad range of specific, legislatively determined subcategories of property through a scheme that leaves no meaningful discretion either in the imposition or in the calculation of the fee. We conclude that the TIF is such an assessment, and we are persuaded by the reasoning of other state courts, representing a nearly unanimous view, that *Dolan*'s heightened scrutiny test does not extend to development fees of that kind. We therefore conclude that the trial court correctly rejected petitioner's constitutional challenge to the TIF.

Affirmed.

APPENDIX B

IN THE SUPREME COURT
OF THE STATE OF OREGON

CA A0465
SC S49535

ROGERS MACHINERY, INC.,
Appellant/Petitioner,

v.

WASHINGTON COUNTY,
Respondent/Respondent,

CITY OF TIGARD,
Respondent/Respondent.

ORDER DENYING REVIEW

The Court has considered the petition for review and orders that it be denied.

DATE: August 13, 2002.

/s/ Robert D. Durham
ROBERT D. DURHAM
PRESIDING JUSTICE

APPENDIX C

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF WASHINGTON

[Filed Nov. 27 1998]

No. C971202CV

ROGERS MACHINERY, INC.,
Petitioner,

v.

WASHINGTON COUNTY and CITY OF TIGARD,
Respondents.

JUDGMENT

This Writ of Review came before this Court on November 5, 1998, for hearing on the merits before the Honorable Thomas W. Kohl. Petitioner appeared through its attorneys David Hunnicutt and Phillp Grillo. Respondent Washington County appeared through its attorneys Dan Olsen and Loretta Skurdahl. Petitioner City of Tigard appeared through its attorneys Charles Corrigan and Gary Firestone.

The Court, having reviewed the record and legal memoranda previously submitted by the parties, having heard argument of the parties, and being fully advised now, therefore, based on the Court's letter opinion attached as Exhibit 1,

IT IS HEREBY ORDERED AND ADJUDGED that the actions of Washington County, the City of Tigard, and the written decision of the hearings officer are affirmed. Petitoner's request for restitution and other relief is denied.

Judgment in favor of Washington County and the City of Tigard and against Rogers Machinery is hereby granted.

DATED this 27 day of November 1998

/s/ Thomas W. Kohl
THOMAS W. KOHL
Circuit Judge

APPENDIX D

[SEAL]

OREGON JUDICAL DEPARTMENT
WASHINGTON COUNTY TRIAL COURTS
TWENTIETH JUDCIAL DISTRICT
WASHINGTON COUNTY COURTS
145 N.E. Second Avenue
Hillsboro, Oregon 97124

November 16, 1998

MS. LORETTA S. SKURDAHL
Sr. Assistant County Counsel
155 N. First, Suite 340
Hillsboro, OR 97124

MR. DAVID HUNNICUTT
Attorney at Law
PO BOX 230637
Tigard, OR 97281

MR. CHARLES E. CORRIGAN
Attorney at Law
1727 NW Hoyt St.
Portland, OR 97209

RE: *Rogers Machinery Inc v. Washington County and City of Tigard*

CASE NO. C971202CR

Dear Counsel:

I find the Washington County traffic impact fee ("TIF") is a tax that was validly imposed and adopted by Washington County as a county wide tax and approved by the voters in 1990. I further find that its purpose was to raise revenue for capacity increasing transportation improvements and that it was limited to that purpose only.

I find that *Dolan v. City of Tigard*, 512 US 374, 114 S.Ct 2309 (1994), is not applicable to the TIF. I further find that the TIF is compatible with the statutes related to the systems development charges.

Therefore, I affirm the actions of Washington County, the City of Tigard and the written decision of the hearing officer

There was an additional issue raised by the Plaintiff in regard to the increased tax that it had to pay due to the timing of the payment. I find that the additional tax imposed upon the Plaintiff was proper under the cirumstances.

Counsel for Defendants shall prepare a judgment accordingly.

Very truly yours,

/s/ Thomas W. Kohl
THOMAS W. KOHL Circuit Judge

cc: Dan Olsen

APPENDIX E

[Attachment "B"]

HEARING BEFORE
WASHINGTON COUNTY HEARING OFFICER

CASE FILE No. 97-164 Appeal

APPLICANT: Rogers Machinery Company

Proposed Development Action:
Appeal of Traffic Impact Fee Assessment

FINDINGS, CONCLUSIONS, AND ORDER

FINDINGS

1. The Applicable Regulations are those those set forth in, Paragraph 1 of the City of Tigard Staff Report of July 17, 1997. The Applicant is appealing the City of Tigard's assessment of a Traffic Impact Fee pursuant to Washington County Ordinance 379-Countywide Traffic Impact Fee ("TIF"), for a General Light Industrial Use, in the amount of $37,102. The Applicant contents that the City is required to establish the fee in proportion to the various uses on the Site. See page 2 Letter of Appeal, February 28, 1997, Attachment 5 to the Staff Report. The Applicant also contents that there should be little or no impact fee because the Applicant is not moving new employees into either the new building or the existing building on the Site. See page 2 Letter of Appeal, February 28, 1997, Attachment 5 to the Staff Report. The Applicant further contents that the TIF, as applied to its development, is an unconstitutional taking, based on the United States Supreme Court Holding in the case *Dolan v.*

City of Tigard, 512 US____, 114 S.Ct 2309, 129 L.Ed. 2d 304 (1994). Applicant argues that the fee bears no relationship to what is actually taking place at the Site.

2. The facts are undisputed. The Applicant is located in the City of Tigard. At its existing location it operates its Corporate Headquarters and its Portland Branch. The Corporate Headquarters includes sales, service, warehousing, accounting and production functions, which serve a nationwide distribution network and a regional branch system. The Applicant has branches in Seattle, Spokane, Boise, Portland, Centralia and Eureka. The Portland Branch includes sales, service and warehousing functions. As a natural part of the evolution of the Applicant's organization, it decided to create a separate building to house the Portland Branch and a Corporate Service Center. This new facility is to relieve overcrowding in the existing building. No new employees are anticipated or planned for the new or existing building. Approximately 40 employees will be moved from the existing building to the new building. To further relieve crowding of the existing facility, production of an entire line of compressors has been shifted to another location. A new computer system has been installed in an effort to accommodate more business without increasing employment. See page 1 and 2 Letter of Appeal, February 28, 1997, Attachment 5 to the Staff Report and testimony of Walter Novac Vice President and Production Manager of Applicant.

3. Mr. Rager presented the Staff Report for the City of Tigard. He summanized the written Staff Report, a copy of which is in the record, including the reasons why the City of Tigard believes the assessment of a TIF for a General Light Industrial Use, in the amount of $37,102 was permitted under Washington County Ordinance 379. Mr. Jim Oliver, City Attorney for the City of Tigard summarized the City's position that the TIF was a tax; that if it was not a tax it is not an exaction under the *Dolan* test; and that if the TIF is an

exaction, it complies with the *Dolan* analysis. *See* Memo of July 9, 1997 Attachment 10 to the Staff Report. Mr. Scott King appeared on behalf of Washington County and referenced his memo of July 17, 1997, a copy of which is in the record. Ms Loretta Skurdahl, assistant County Counsel for Washington County appeared and summarized the County's legal position that the Countywide TIF is a tax. See Memo of July 10, 1997 Attachment 9 to the Staff Report.

4. Mr. Phil Grillo, counsel and Chris McKillop, corporate counsel appeared on behalf of the Applicant, Mr. Walter Novac, Vice President and Production manager was called as a witness. He testified that the Applicant has few walk in customer and was not planning to add any new employees. He stated that the purpose of the new building was to allow the Applicant to operate more efficiently. Chris Stanely of Kittleson and Associates testified that the City's classification of the Applicant's use. Light industrial, was incorrect because the Applicant's activities did not appeal to closely match light industrial activities. Mr. Grillo made legal arguments on behalf of the Applicant. Applicant's Exhibits 1 to 6 were offered and admitted into evidence.

5. The record was kept open until August 1, 1997 to allow the parties to submit rebuttal and arguments. Mr. Grillo submitted a memorandum dated August 1, 1997 on behalf of the Applicant. Ms. Skurdahl submitted a memorandum dated August 1, 1997 on behalf of Washington County. Mr. Oliver submitted a memorandum dated August 1, 1997 on behalf of the City of Tigard.

6. The Hearings Officer has reviewed the legal memorandums submitted by the parties. Although the law is less than clear, in the Hearings Officer's judgement the TIF is a tax and not a fee. It is a tax imposed upon new development in Washington County. The Applicant has received a building permit and is subject to this tax. On this issue the Hearings Officer concurs with the legal analysis set forth in the County

Counsel's memo of July 10, 1997 and August 1, 1997. See Memo of July 10, 1997, Attachment 9 to the Staff Report and Ms. Skurdahl's Memo of August 1, 1997 at pages 3 and 4.

7. In the Hearings Officer's judgement *Dolan* was based on a review of a local government's regulatory power, not upon a review of a local government taxing power and therefore does not apply.

8. Applicant makes an interesting argument that the TIF ordinance was preempted by state statute, ORS 223.297 to 223.314 addressing System Development Charges. *See pages 4 to 5 of Mr. Grillo's Memorandum of August 1, 1997.* In the Hearings Officer's opinion, the TIF ordinance is not pre-empted by state statute for the reason set forth in the County Counsel's memo of August 1, 1997. *See Ms. Skurdahl's Memo of August 1, 1997 at pages 1 and 2.*

9. Applicants argues that because it does not intend to hire new employees, it will generate no new trips. This argument seems reasonable. However the TIF is a tax based on the trip generation rate of a given land use sampling of like uses nationwide. *See Memo of Scott King of July 17, 1997.* Ordinance 379 provides for the calculation of the tax, TIF, in Section 3.17.050. That Section provides in part:

> "The amount of tax due shall be determined by multiplying the following applicable dollar amount by the number of average weekday trips generated by new or remodeled structures in accordance with the trip determinations set forth in Appendix "A" . . ." (emphasis added)

Appendix A sets forth certain Land Use Categories and trip generation rates for these categories. Significantly the ordinance does not allow either a government entity, or an applicant, to establish that the trip rates, set forth in Appendix A, are different than the actual trip rates, and to then use these actual rates in calculating the tax. Applicant and others

believe this system to be extremely unfair. It gives the appearance of unfairness because the TIF purports to be a tax for new traffic impacts generated by a development, but it can be imposed when the proposed use, such as in the instant case, will generate no new trips. The County would argue that the use of the buildings could change in the future. In drafting the TIF, the Commissioners could have used actual trip rates, or provided that the trip determinations, in Appendix A, could be changed upon proof of actual trip rates. However, the Commissioners did not adopt such language. The Hearings Officers has no authority to amend the Ordinance.

10. The Hearings Officer finds that pursuant to Section 3.17.050(C) the Staff should have appointed the new building. The Hearings Officer finds the TIF calculation should be appointed as set forth on page 6 of the Staff Report.

CONCLUSION

Based on the findings above the appeal should be denied except that the TIF calculation should be apportioned as set forth on page 6 of the Staff Report.

ORDER

The Appeal is denied except that the TIF calculation shall be apportioned as set forth on page 6 of the Staff Report.

Dated this 21st day of August 1997.

/s/ Dale M. Hermann
DALE M. HERMANN, Hearing Officer

APPENDIX F

3.17.010 Short title.

This chapter shall be known, and may be pleaded as, the Washington County traffic impact fee ordinance. (Ord. 379 § 3(Exhibit A(part)), 1990)

3.17.020 Purpose and scope.

A. This tax is adopted to ensure that new development contributes to extra capacity transportation improvements needed to accommodate additional traffic generated by such development.

B. This tax shall provide funds for extra capacity improvements to county and city arterials and certain collectors or state facilities. It applies throughout the county, including within incorporated cities. (Ord. 379 § 3(Exhibit A (part)), 1990)

3.17.030 Definitions.

As used in this chapter unless the context requires otherwise:

A. "Applicant" means the person seeking to obtain a building permit.

B. "Arterial" means that term as defined in the comprehensive plan.

C. "Base report" means the report dated August 1990 and adopted as Appendix D to the ordinance codified in this chapter and on file in the department of land use and transportation.

D. "Board" means the board of county commissioners of Washington County, Oregon.

E. "Building official" means that person, or his designee, licensed by the state and designated as such to administer the State Structural Specialty Code for the county or city.

F. "Building permit" means that permit issued by the county or city building official pursuant to the Uniform Building Code. In addition, "building permit" means the mobile home placement permit issued by the director, or his representative, on a form approved by the Department of Commerce of the state and relating to the placement of mobile homes in the county. For those uses for which no building permit is provided, the final approval granted by the jurisdiction approving the use shall be deemed a building permit for purposes of this chapter.

G. "Business and commercial" means that land use category as identified by those structures as shown in Appendix A attached hereto, or any other structures as determined by the director pursuant to Section 3.17.050.

H. "City council" means the governing body of each incorporated city having jurisdiction over property within the boundaries of the county.

I. "Collector" means a nonarterial road or street designated on the base report adopted as Appendix D of the ordinance codified in this chapter, as amended.

J. "Comprehensive plan" means the comprehensive plan, transportation plan, capital improvements plan, public facilities plan or equivalent plan adopted by ordinance by the applicable jurisdiction.

K. "Construction cost index" means an annual construction cost estimate based on a composite of the unit costs for specified construction components of all accepted construction contracts entered into by the

Oregon Department of Transportation during a single year indexed to the quantity and total cost of such items for the years 1960 through 1962, inclusive, and computed using the formula set forth in Appendix B attached hereto, attached and by this reference incorporated herein.

L. "County" means Washington County, Oregon.

M. "Department" means the county department of land use and transportation, or, in those cities that have opted to collect and administer this tax, the department charged with the duties.

N. "Development" means any man-made change to improved or unimproved real estate which has the effect of generating additional weekday or weekend trips as determined in a manner set forth in Sections 3.17.050A or 3.17.050B whichever is applicable.

O. "Director" means the director of the department of land use and transportation, or in those cities that have opted to collect and administer this tax, the person designated by the city to so act.

P. "Extra capacity facilities or improvements" means those transit, arterial and collector improvements that are necessary in the interest of public health, safety and welfare to increase traffic capacity to address new development. Such improvements include, but are not limited to, signalization, channelization, widening, drainage work, pedestrian safety, lighting, acquisition of right-of-way and necessary easements, street extensions, railroad crossing protective devices, bridges and bike paths, and transit.

Q. "Fee" shall mean the traffic impact tax adopted herein.

R. "Industrial" means that land use category as identified by those structures as shown in Appendix A, attached hereto, or any other structures as determined by the director pursuant to Section 3.17.050.

S. "Institutional" means that land use category as identified by those structures shown in Appendix A, attached hereto, or any other structures as determined by the director pursuant to Section 3.17.050.

T. "Occupancy permit" means the occupancy permit provided for in the Uniform Building Code or other ordinance of the applicable jurisdiction. If no occupancy permit is provided for a particular use, the final inspection and approval shall serve as the occupancy permit.

U. "Offices" means that land use category as identified by those structures as shown in Appendix A, attached hereto, or any other structures as determined by the director pursuant to Section 3.17.050.

V. "Residential" means that land use category as identified by those structures as shown in Appendix A, attached hereto, or any other structures as determined by the director pursuant to Section 3.17.050.

W. "Road" means a county road or city street.

X. "Temporary construction facility" means those facilities needed on an interim basis for construction of specific uses, structures or road improvements, and which are intended to be discontinued when construction is complete. Such facilities include, but are not limited to, accessory construction structures, staging areas, parking, and park-and-ride lots in conjunction with construction of a facility.

Y. "Temporary use" means a use or structure on improved or unimproved real estate which is of impermanent nature, and is used for less than ninety days in a calendar year.

Z. "Traffic impact fee" means the tax imposed and required to be paid pursuant to this chapter. (Ord. 435 § 4(A), 1993; Ord. 379 § 3(Exhibit A(part)), 1990)

3.17.040 Imposition and exceptions.

A. A traffic impact tax is imposed on all development in the county, including inside cities, as provided for herein.

B. The following development is exempt from the tax:

1. Remodeling or replacement of any single-family structure (including mobile homes);

2. Multifamily structure remodeling or replacement except to the extent of addition of dwelling units;

3. Remodeling or replacement of office, business and commercial, industrial or institutional structures except to the extent it generates additional average weekday trips as determined in the manner set forth in Appendix A or as provided by Section 3.17.050(B) whichever is applicable;

4. Temporary uses which do not exceed ninety days in a calendar year;

5. Temporary construction facilities as determined by the director;

6. Development not subject to this chapter pursuant to Section 3.17.160 (Transition);

7. A transit improvement which has the impact of removing vehicle trips or reducing vehicle miles of travel on the county's major roadway system, as approved by the director;

8. Construction, remodeling or expansion of federal or state facilities and uses otherwise exempt from taxation by counties. (Ord. 435 § 4(B), 1993; Ord. 379 § 3(Exhibit A(part)), 1990)

3.17.050 Amount.

A. The amount of the tax due shall be determined by multiplying the following applicable dollar amount, adjusted as provided in subsection E of this section, by the number of average weekday trips generated by the new development in accordance with the basis for trip determination set forth in Appendix A attached hereto and incorporated herein.

Residential use	$135 per average weekday trip
Business and commercial use	$34 per average weekday trip
Office use	$124 per average weekday trip
Industrial use	$130 per average weekday trip
Institutional use	$ 56 per weighted average daily trip

The amount of the traffic impact fee for institutional uses shall be based on the weighted average daily calculated as follows:

(average weekday trip rate x 5) + (average weekend trip x 2)/ 7

B. In the event an identified use does not have a basis for trip determination stated in Appendix A, *i.e.*, not available, the director shall either:

1. Determine the trip generation based on the use listed in Appendix A most similar in traffic generation; or

2. At the election (and expense) of the applicant, consider actual trip generation of a same or similar use verified by a registered traffic engineer. In the event actual trip generation is utilized, the director may make such adjustments as he deems applicable in consideration of location, size and other appropriate factors in determining the average weekday trip.

C. It is recognized that single structures may include more than one use. In such event the director for purposes of establishing the traffic impact fee shall proportion the uses accordingly.

D. The applicant shall, at the time of application for a building permit, provide the department with necessary and applicable information, such as the type of use, number of employees or square footage of structures, necessary to calculate the traffic impact fee.

E. Notwithstanding any other provision, the dollar amounts set forth in subsection A of this section shall on May 1st of each year be computed to increase automatically by six percent unless the board of commissioners of the county first determines that the construction cost index is a more accurate estimate of the increase or decrease in construction costs. Upon such a determination, the amounts set forth in subsection A of this section shall be increased or decreased by the average percentage fluctuation of the construction cost index over the previous ten years. In no event, however, shall there be an annual increase in the excess of six percent. Notwithstanding the foregoing, all calculations shall be carried out to the hundredths place. A final product ending in $0.49 or less shall be rounded down to the nearest dollar, $0.50 or more up to the next dollar.

F. The construction cost index for 1986 and subsequent years shall be prepared by an Oregon registered professional engineer employed or retained by the county. The index shall be prepared in accordance with the formula set forth in Appendix B and generally accepted construction cost indexing standards. The Oregon Highway Composite Construction Cost Index for the fourth quarter of 1985, attached to the ordinance codified in this chapter and by this reference incorporated herein as Appendix C, is adopted as the

composite index for the years 1975 through 1985 to be used in computing the average percentage increase or decrease over the previous ten years.

G. Washington County promptly shall notify each city in writing of the increase or decrease. The adjustment to the dollar amount as described above apply to all building permit applications accepted for review on or after July 1st, by the county or city having jurisdiction over the development.

H. The decision of the board, including the accuracy of the construction cost index and its application, shall be reviewable solely under ORS 34.010 through 34.100, relating to writs of review, in the Circuit Court in the county. (Ord. 379 § 3(Exhibit A(part)), 1990)

3.17.060 Payment.

A. Unless deferred, the tax imposed is due and payable at the time of issuance of a building permit by the county or city. Except as otherwise provided in this chapter, no building permit shall be issued for a development subject to this tax unless the tax is first paid in full.

B. Notwithstanding subsection A of this section, in those cases where the amount due for any one building permit exceeds five thousand dollars, the applicant may request a payment deferral. The request must be made in writing to the director no later than the time of application for a building permit. The director shall grant deferral to the traffic impact fee, however, any traffic impact fee shall be paid in full prior to the issuance of an occupancy permit. The amount of TIF due on deferred obligations shall be the amount in effect at the time of issuance of the occupancy permit. Deferred TIF obligations shall not be eligible for internal financing or bancrofting as provided in subsection C unless so requested at the time of application for deferral. Selection of the credit or

offset option must be made at the time of application for deferral. Failure to specify shall be deemed to be selection of the credit option. The selection is irrevocable.

C. Any traffic impact fee may be eligible for internal financing or a bancrofting agreement pursuant to ORS 223.205 through 223.785, the Bancroft Bonding Act or any adopted city process. Bancrofting and installment payment agreements, as allowed herein, shall be limited in term in the following manner:

Traffic impact fee through $1,000 . . . . . 3 years

Traffic impact fee from $1,001 through $5,000 . . 5 years

Traffic impact fee $5,001 and more . . . . . 10 years

Any installment or bancroft agreement provided by this section shall have an interest rate as determined, at the time of the application, by the chief county or city financial officer and in recognition of the then current market rates and costs associated with the administration of such agreements. Applications for an agreement, as provided in this chapter, must be made at the time of building permit application, or occupancy permit if permitted pursuant to subsection B of this section.

No applications made subsequent to issuance of the building permit, or occupancy permit if allowed by subsection B of this section, shall be considered. Any traffic impact fee using an agreement shall be a lien pursuant to ORS 223.230 or city provision. No offset shall be allowed for any tax satisfied through use of an agreement provided in this section. (Ord. 379 § 3(Exhibit A(part)), 1990)

3.17.070 Credit.

An applicant for a building permit, or occupancy permit if deferral has been granted, shall be entitled to a credit against the tax for constructing eligible capital improvements as defined herein.

A. An extra capacity road or transit improvement is eligible for credit provided it meets all of the following:

1. With the exception of eligible transit improvements, the improvement must be on a facility designated as an arterial or collector facility in the base report, adopted as Appendix D as part of the ordinance codified in this chapter, and incorporated as if fully set forth herein.

2. The improvement must be designed and constructed to provide additional capacity to meet projected future transportation needs. Improvements that address capacity deficiencies existing at the time of development are not eligible. In the case of improvements addressing both, only that portion providing future capacity is eligible; and

3. The director determines that the timing, location, design and scope of proposed improvement is consistent with and furthers the objectives of the capital improvements program of the jurisdiction and, either;

4. a. The improvement is required to fulfill conditions of development approval issued by the jurisdiction with land use decision making authority; or

b. The improvement is within the impact area of the development. For purposes of this section, impact area is that geographic area determined by the director in which the estimated traffic to be generated by the development exceeds ten percent of the existing average daily traffic. Existing traffic volumes shall be those observed within six months prior to filing the development application, adjusted for daily and seasonal traffic variations using factors provided by the director.

B. A road or transit improvement constructed to address a safety hazard is eligible for credit if it meets the following:

1. With the exception of eligible transit improvements, the improvement must be on a facility designated as an arterial or collector in the base report; and

2. The improvement must have been mandated as a condition of development approval and be located within the impact area of the development, as determined pursuant to subsection (A)(4)(b) of this section.

C. Credit eligibility shall be determined by the director. In addition to meeting the standards of subsections A and B of this section, the following shall control:

1. There shall be no credit for improvements to the center twenty-eight feet of an existing road, except safety improvements creditable under subsection B of this section.

2. New roads are eligible projects as long as they meet the remaining project eligibility criteria. An existing dirt of gravel road is deemed new if its daily traffic volume is below two hundred vehicles per day. For new facilities, TIF credits may be issued for the entire roadway width.

3. Improvements which primarily function as access to a private street or driveway are not eligible.

4. Improvements, including travel lanes and bike lanes, must be at ultimate alignment, line and grade except that said improvements need not be at ultimate alignment, line and grade if the improvement is a safety improvement as provided in subsection B of this section.

5. Bike lanes are eligible only if required pursuant to an adopted comprehensive plan.

6. For intersection signals and related devices, only fifty percent of extra capacity or safety intersection improvements shall be eligible if the intersection involves one eligible and one noneligible road. Two-thirds shall be eligible in the case of a T-intersection involving an eligible through road only. One-third shall be eligible in the case of a T-intersection involving a noneligible through road.

7. Transit extra capacity or safety capital improvements such as bus shelters, turnouts, park and ride lots may be eligible if approved by the appropriate transit authority. No transit credit shall exceed ten percent of the TIF due.

8. No credits shall be issued for landscaping, street lighting, storm sewers, sidewalks, and erosion control; or sound walls, berms or other such mitigation devices.

9. Road right-of-way required to be dedicated pursuant to the applicable comprehensive plan or development condition is not creditable. The reasonable market value of land purchased by the applicant from a third party to complete a required off-site improvement is creditable.

10. No credit shall granted for utility relocation except for that portion which otherwise would have been the legal obligation of the jurisdiction pursuant to a franchise, easement or similar relationship.

11. No credit shall be granted for minor realignments not designated on the comprehensive plan.

12. No more than 13.5 percent of the total eligible construction cost shall be creditable for survey, engineering, and inspection.

D. All requests for credit vouchers must be in writing and filed with the director not more than ninety days after acceptance of the improvement. Improvement acceptance shall be in accordance with the practices, procedures and standards of the applicable jurisdiction. The amount of any credit shall be determined by the director and based upon the subject improvement construction contract documents, or other appropriate information, provided by the applicant for the credit. Upon a finding by the director that the contract amounts exceed prevailing market rate for a similar project, the credit shall be based upon market rates. The director shall provide the applicant with a credit voucher, on a form provided by the department. The original of the credit voucher shall be retained by the department. The credit voucher shall state a dollar amount that may be applied against any traffic impact fee imposed against the subject property. In no event shall a subject property be entitled to redeem credit vouchers in excess of the traffic impact fee imposed. This paragraph applies only to issuance of credit vouchers and does not extend the deadline for credit redemption or otherwise modify the credit redemption deadline in Section 3.17.070F.

E. Credits shall be apportioned against the property which was subject to the requirement to construct an improvement eligible for credit. Unless otherwise requested, apportionment against lots or parcels constituting the property shall be proportionate to anticipated average weekday trips generated by the respective lots or parcels except for institutional which shall be based on a full week. Upon written application to the director, however, credits shall be reapportioned from any lot or parcel to any other lot or parcel within the confines of the property originally eligible for the credit. Reapportionment shall be noted on the original credit voucher retained by the department.

F. Any credits as provided in this chapter are assignable, however, they shall apply only to that property subject to the original condition for land use approval upon which the credit is based or any partitioned or subdivided parcels or lots of such property to which the credit has been apportioned. Credits shall only apply against traffic impact fees, are limited to the amount of the fee attributable to the development of the specific lot or parcel for which the credit is sought and shall not be a basis for any refund.

G. Any credit must be redeemed not later than the issuance of the building permit or, if deferral was permitted pursuant to Section 3.17.060, issuance of the occupancy permit. The applicant is responsible for presentation of any credit prior to issuance of the building or occupancy permit. Except as provided in Section 3.17.110, under no circumstances shall any credit redemption be considered after issuance of a building permit or, if deferral was granted, issuance of an occupancy permit.

H. Credit vouchers shall expire on the date ten years after the acceptance of the applicable improvement by the appropriate jurisdiction. No extension of this deadline shall be granted.

I. Upon annexation, credits previously issued by the county shall be honored by the jurisdiction collecting the tax provided they are redeemed timely. (Ord. 465 § 4(A), 1995; Ord. 435 § 4(C), 1993; Ord. 398 § 4(A), 1991; Ord. 379 § 3(Exhibit A(part)), 1990)

3.17.080 Offset alternative for certain safety improvements.

A. In lieu of a traffic improvement credit from the director, a developer may choose to receive a dollar-for-dollar cash offset. This offset shall be available only against the cost of traffic safety improvements which would otherwise be eligible for a credit as provided in Section 3.17.070. If TIF

deferral is sought pursuant to 3.17.060(B), the offset option must be selected at the time of application for deferral. Failure to do so means the offset option is waived.

B. To obtain offset payments, the developer shall file a written request, on a form approved by the director, for an offset in-lieu of credit. This request must be filed within ninety days of acceptance of the improvement by the district and include the cost information required by Section 3.17.070(D). Eligible traffic safety costs of a development may be subject to offset or credit, but not both.

C. The amount of cash offset shall be calculated by the director in the same manner as provided in Section 3.17.070(D) for a credit.

D. The director shall establish an offset account sufficiently identifying each developer and development for which an offset has been requested. As cash taxes are collected for the development, the taxes shall be deposited into the account until sufficient funds are deposited to reimburse the developer for the full amount of eligible improvement costs. No interest shall be due or payable on the funds in the account. Traffic impact feet moneys paid in excess of the offset amount shall be deposited in the traffic impact fee fund. No offset funds shall be made available for traffic impact fees satisfied by use of credits or made subject to a bancroft agreement.

E. Beginning January 2, through and including five p.m., January 31st of each year, the developer who actually incurred eligible traffic safety improvement costs may file a written claim for offset moneys placed in the account for the subject development during the preceding calendar year. The claim shall be on a form approved by the director. No claim for offsets shall be accepted or processed after this deadline. For purposes of this section, an offset request is timely filed if postmarked January 31.

F. Within thirty days of receipt of a claim for offset, the director shall verify eligibility and issue payment to the claimant for the eligible amount expended as of December 31 of the previous year, less an administrative fee of three percent of the offset amount to a maximum administrative fee of two thousand dollars per account per year. In no event shall the payment exceed the amount of traffic impact fee moneys actually received during the previous year from the development conditioned to make the eligible safety improvement. In no event shall payment exceed the approved cost of eligible safety improvements. Any unclaimed balance remaining on February 1st shall not be eligible for offset and shall be transferred to the traffic impact fee fund.

G. Traffic safety improvement costs shall be eligible for offset for up to ten years after the assurance is provided. Offsets can no longer be claimed after January 31st of the tenth year following acceptance of the assurance, regardless of whether TIF revenues may continue to be generated by the development of whether the improvement has been completed. Remaining revenue shall be deposited in the TIF fund.

H. Offsets are nontransferable and nonassignable. They shall apply only to that property subject to the original condition for land use approval upon which the offset is based. Offsets shall only apply against traffic impact fees, are limited to the amount of the tax attributable to the development for which the offset is sought and shall not be a basis for any refund. (Ord. 465 § 4(B), 1995; Ord. 379 § 3(Exhibit A(part)), 1990)

3.17.090 Dedicated fund.

A. The county and each city shall create a dedicated fund entitled "traffic impact fee fund," herein "fund." All moneys derived from this tax shall be placed in the fund. Traffic impact fee revenue, including interest on the fund, shall be

used for no purpose other than those activities described as, or for the benefit of, extra capacity facilities as defined herein.

B. Moneys received from payment of traffic impact fees subject to offset shall be placed in an account identifying the developer and development conditioned to make the eligible safety improvement. Moneys received in excess of that required to honor offsets shall be placed directly in the fund. In addition, funds remaining due to unclaimed offsets shall be deposited in the fund upon expiration of the claim period. (Ord. 379 § 3(Exhibit A(part)), 1990)

3.17.100 Use of TIF revenues.

A. TIF revenues may be spent to provide new or expanded arterial and collector projects as shown in the base report and extra capacity transit projects including all related improvements necessary to meet adopted standards. In addition, the reasonable and customary costs of administering this tax and projects funded hereunder, including repayment of debt, may be paid from TIF revenues.

B. Notwithstanding subsection A of this section, the following limitations apply:

1. For expansion of existing roads, except realignments of existing roads to fulfill an adopted transportation or capital improvements map, no TIF revenues shall be expended on the center twenty-eight feet;

2. The sum of ten dollars per trip generated from development of properties inside the jurisdiction of a transit district, increased annually as provided in Section 3.17.050(E), shall be reserved for extra capacity transit improvements; and

3. Except as provided in subdivision 4 of this subsection, fifty percent of all revenues, net of credits and the transit apportionment, annually collected by each

jurisdiction shall be reserved for use only for arterials designated in the base report adopted herein. Such funds may be used for collectors only if the county certifies that all necessary extra capacity improvements to arterials in the base report have been assured. "Assured" means completed or that funds have been set aside in the form of cash, cash- in-escrow, letters of credit or similar binding obligation acceptable to county.

4. Notwithstanding subdivision 3 of this subsection, the county and a city may by intergovernmental a agreement allow TIF funds to be spent on a specific collector project within the city or which directly benefits the city regardless of whether nonassured arterial needs exist.

C. TIF revenues shall be spent on improvements within the boundaries of the jurisdiction in which the tax was collected or which directly benefit the jurisdiction. In those cities which have not opted to administer this tax, taxes collected by the county building permits issued by the cities shall be spent only on county arterials and major collectors within or directly benefiting the city until such time as the county certifies that all extra capacity needs on such facilities have been assured. Upon certification, the county may spend the funds on any county arterial or major collector. Taxes collected by the county from properties within an acknowledged urban planning area shall be spent by the county only within that area or to directly benefit that area until the county formally certifies that all county arterial and major collec tor needs have been met, at which time the funds may be spent on any county arterial or major collector. (Ord. 379 § 3(Exhibit A(part)), 1990)

3.17.110 Refunds.

Refunds of traffic impact fees may be made upon initiation of the director or upon written application filed with the director. Refunds shall be allowed upon a finding by the

director that there was clerical error in the calculation of the traffic impact fee. Refunds shall be allowed for failure to redeem a credit voucher or offset provided the claim for refund is in writing and actually received by the appropriate jurisdiction within thirty days of the date of issuance of the building permit or occupancy permit if deferral was granted. No refund shall be granted for any reason other than those expressly provided for herein. (Ord. 435 § 4(D), 1993: Ord. 379 § 3(Exhibit A(part)), 1990)

3.17.120 Administration.

A. Except as provided in subsection B below, proof of payment of the tax to the county shall be required prior to issuance of a building permit or occupancy permit if deferred, for any development in the county, including any incorporated city.

B. Each city shall be entitled to collect the tax and administer this chapter within its city limits provided it files with the board of county commissioners a resolution or ordinance approved by the city council and containing the following:

1. Agreement to administer the tax in full compliance with its terms;

2. Acceptance of full and sole responsibility for proper administration in accordance with the chapter, including for any fund deficiencies notwithstanding termination;

3. A provision for ninety days notice of termination by city and an agreement to transition administration to the county in a reasonable and good faith manner.

C. Upon filing the ordinance or resolution, the city shall be entitled to retain one hundred percent of all tax revenues it collects to be used pursuant to this chapter. (Ord. 379 § 3(Exhibit A(part)), 1990)

3.17.130 Collection.

A. Notwithstanding issuance of a building or occupancy permit without payment, the tax liability shall survive and be a personal obligation of the permittee.

B. Intentional failure to pay the tax within sixty days of the due date shall result in a penalty equal to fifty percent of the tax. Interest shall accrue from the sixty-day point at the legal rate established by statute.

C. In addition to an action at law and any statutory rights, the jurisdiction due the tax may:

1. Refuse to issue any permits of any kind to the delinquent party for any development;

2. Refuse to honor any credits held by the delinquent party for any development;

3. Condition any development approval of the delinquent party on payment in full, including penalties and interest;

4. Revoke any previous deferrals issued to the delinquent party, in which case the amount immediately shall be due, and refuse to issue any new deferrals;

5. Withdraw the amount due, including penalties and interest, from any offset account held by the jurisdiction for the delinquent party.

D. For purposes of this section, delinquent party shall include any person controlling a delinquent corporate permittee and, conversely, any corporation controlled by a delinquent individual permittee. (Ord. 379 § 3(Exhibit A(part)), 1990)

3.17.140 Annual review.

A. The county annually shall review the traffic impact fee to determine whether additional tax revenues should be generated to provide extra capacity improvements needed to address new development or to ensure that revenues due not exceed identified demands. In so doing, the county shall consider:

1. Construction of facilities by federal, state or other revenue sources;

2. Receipt of unanticipated funds from other sources for construction of facilities;

3. New information provided by the Institute of Transportation Engineers adjusting trip rates; and

4. The impact of credits and offsets for safety improvements.

B. Upon completion of this review the county shall consider such amendments, including adjustment to the tax imposed herein, as are necessary to address changing conditions. (Ord. 379 § 3(Exhibit A(part)), 1990)

3.17.150 Review of decisions.

A. Review of Expenditures.

1. Any citizen or other interested person may challenge an expenditure of TIF revenues as being in violation of this chapter provided a written petition for review is filed with the board of commissioners of the county within two years of the expenditure. The petition shall identify with reasonable certainty the expenditure, the relevant facts and the specific provision alleged to have been violated.

2. The board shall order an investigation and direct that within sixty days of receipt of the petition a written report be filed recommending appropriate action. Within

thirty days of receipt of the report, the board shall conduct a hearing to determined whether the expenditure was proper. At least ten days notice of the hearing, including a copy of the report, shall be mailed to the petitioner. Petitioner shall have a reasonable opportunity to present his or her position at the hearing.

3. The board may by resolution and order adopt rules of procedure governing the hearing including that the hearing may be continued if necessary to further address the issues.

4. The petitioner shall have the burden of proof. Evidence and argument shall be limited to grounds specified in the petition. The board shall issue a written decision stating the basis for its conclusion and directing appropriate action be taken.

5. Review of the board decision shall be as provided in ORS 34.010 to 34.100.

6. For purposes of this section, "city council" shall be substituted for "board of commissioners" if the petition arises from expenditures made by a city which opted to collect and administer this tax as provided in Section 3.17.110.

B. Review of decisions of the director:

1. Discretionary decisions of the director shall be in writing and mailed by regular mail to the last known address of the applicant.

2. Any person aggrieved by a discretionary decision of the director may appeal the decision to the county hearings officer. The appeal shall be in writing and must be filed with the director within fourteen days of the date the director's decision was mailed.

3. The appeal shall state the relevant facts, applicable ordinance provisions and relief sought. The appeal shall be heard by the county hearings officer in the same manner as provided for development permit applications. The county may by resolution establish a reasonable appeal fee.

4. The appellant shall have the burden of proving that an error was committed resulting in substantial prejudice.

5. The decision of the hearings officer shall be reviewable solely under ORS 34.010 through 34.100 in the Circuit Court of the county. (Ord. 379 § 3(Exhibit A(part)), 1990)

3.17.160 Transition.

A. This chapter shall apply to issuance of building permits for all development for which a building permit application is received by the county, or any city, on or after the effective date. This shall not include resubmittal of building permit applications previously deemed incomplete if the requested information is submitted within one hundred eighty days of the date the application was first submitted.

B. Notwithstanding these amendments, and except as provided for credits in subsection C of this section, the prior provisions of the TIF shall continue to be fully applicable and shall govern all building permit applications received by the county prior to the effective date of the ordinance codified in this chapter. This shall include building permit applications previously deemed incomplete if the requested information is submitted within one hundred eighty days of the date the application was first submitted.

C. All deferrals, credits, offsets and brancroft payment agreements shall continue and be administered under the terms in existence when issued except that all credits and

offsets which have not previously expired, or which expired between the period on or after April 25, 1995 to the effective date of Ordinance 465, August 8, 1995, shall be valid for a period of ten years from the original date of acceptance of the improvement by the jurisdiction for credits and ten years from acceptance of the assurance for offsets. Repeal and enactment shall in no way impact any budget or appropriations, contracts, permits, condemnation proceedings or any other formal actions after pursuant to Ordinance No. 310 as amended and Ordinance No. 379 as amended. Repeal and enactment shall in no way impact any systems development charge, fee, or tax imposed by any city. This provision does not preclude any city from repealing or amending any such program, except that no credit or offset from TIF shall be granted against any credit or amount due city under a pre-existing program.

D. Notwithstanding any other provision, an extra-capacity improvement constructed inside the corporate limits of a city, which otherwise would not be eligible, shall be eligible for credits if all of the following conditions are met:

1. The facility is listed as an eligible arterial facility in the Base Report, as amended;

2. The improvements were completed on or after January 1, 1988;

3. The city finds that it represented to the developer that the improvements would be eligible for TIF credit upon adoption of county-wide TIF and finds that the developer relied on such representations;

4. The improvement met the eligibility standards for credits under the city systems development charge ordinance but the developer did not pay an SDC or receive credits under the SDC ordinance;

5. The developer files for a credit within ninety days of the effective date of the ordinance codified in this chapter.

Except as provided above, eligibility for, the amount of, and the duration of credits shall be determined in the same manner as for any other credit. (Ord. 465 § 4(C), 1995; Ord. 435 § 4(E), 1993; Ord. 398 § 4(B), 1991; Ord. 379 § 3 (Exhibit A(part)), 1990)

APPENDIX A

LAND USE CATEGORY/DESCRIPTION	BASIS FOR TRIP DETERMINATION	WEEKDAY AVERAGE TRIP RATE	WEEKEND AVERAGE TRIP RATE
Residential			
210 — Single-Family Detached Housing	Number of Units	10.0	
220 — Apartment	" "	6.10	
221 — Low-Rise Apartment	" "	6.60	
222 — High-Rise Apartment	" "	4.20	
230 — Residential Condominium	" "	5.85	
231 — Low-Rise Condominium	Not Available *		
232 — High-Rise Condominium	Number of Units	4.18	
240 — Mobile Home	" "	4.81	
250 — Retirement Community	" "	3.30	
260 — Recreational Home	" "	3.16	
270 — Planned Unit Development (Residential)	" "	7.44	
Institutional			
010 — Waterports Ship Berths	100.003 *		
020 — Airport	Not Available * *		
021 — Commercial Airport	Avg. Flights/Day	11.83 *	
022 — General Aviation Airport	" "	3.06 *	
030 — Truck Terminals	T.G.S.F.	9.86	
040 — Railroad Terminal	Not Available * *		
410 — Park	Parking Spaces	7.58	11.82
411 — City Park	Acres	3.66	33.58
412 — County Park	Acres	2.11	2.26
413 — State Park	Acres	1.05	1.78
420 — Marina	Boat Berths	3.00	5.55
430 — Golf Course	Parking Spaces	6.62	5.95
440 — Theater	Not Available * *		
441 — Live Theater	" " * *		

442 — Music Theater " " * *
443 — Movie Theater (sit down) Parking Spaces 6.191 7.181
444 — Drive-In Theater Not Available * *
450 — Stadium Parking Spaces 0.55 *
451 — Baseball/Football Not Available * *
452 — Horse Race Parking Spaces 1.08 *
453 — Auto Race Not Available * *
454 — Dog Race " " * *
460 — Camp " " * *
491 — Tennis Courts T.G.S.F. 32.93 23.80
492 — Racquet Clubs " 15.94 23.85
501 — Military Base Number of Employees 1.78 *
510 — Preschool Not Available * *
520 — Elementary School Number of Students 1.03 *
530 — High School " " " 1.39 *
540 — Junior/Community College " " " 1.55 *

LAND USE CATEGORY/DESCRIPTION	BASIS FOR TRIP DETERMINATION	WEEKDAY AVERAGE TRIP RATE	WEEKEND AVERAGE TRIP RATE
Washington County Code 3.17 Appx. A (Washington County 7-00)			
65			
550 — University	Number of Students	2.41 *	
560 — Church	T.G.S.F.	7.70	18.18
565 — Day Care Center	"	67.00	6.15
570 — Court	Not Available	* *	
571 — Prison4	"	* *	
580 — Museum/Gallery	"	* *	
590 — Library	T.G.S.F.	45.50	25.39
610 — Hospital	T.G.S.F.	16.69	11.29
620 — Nursing Home	Number of Beds	2.60	2.26

Business and
Commercial

310 — Hotel Number of Rooms 8.70
320 — Motel " " " 10.19
330 — Resort Hotel " " " 18.40
810 — Retail-General Not Available *

Merchandise

811 — Specialty Store " " *
812 — Building Materials/Lumber T.G.S.F. 30.56
813 — Lumber Not Available *
814 — Specialty Retail Center T.G.L.S.F. 40.68
815 — Discount Stores " 70.16
816 — Hardware/Paint Store T.G.S.F. 53.21
817 — Nursery " 36.17
820A — Shopping Center under
50,000 Gr.Sq.Ft. T.G.L.S.F. 94.71
820B — Shopping Center 50,000-
99,999 Gr.Sq.Ft. T.G.L.S.F. 84.512
820C — Shopping Center 100,000-
199,999 Gr.Sq.Ft. " 66.622
820D — Shopping Center 200,000-
299,999 Gr.Sq.Ft. " 53.622
820E — Shopping Center 300,000-
399,999 Gr.Sq.Ft. " 45.662
820F — Shopping Center 400,000-
499,999 Gr.Sq.Ft. " 41.412
820G — Shopping Center 500,000-
999,999 Gr.Sq.Ft. " 36.632
820H — Shopping Center 1,000,000-
1,200,000 Gr.Sq.Ft. " 32.822
820I — Shopping Center Over
1,200,000 Gr.Sq.Ft. " 32.382
831 — Quality Restaurant T.G.S.F. 95.622
832 — High-Turnover, Sit-Down
Restaurant " 100.003

833 — Drive-In Restaurant " 100.003
834 — Drinking Place Not Available *
841 — New Car Sale T.G.S.F. 47.52
842 — Used Car Sale Not Available *
3.17 Appx. A Washington County Code
(Washington County 7-00)
66

LAND USE CATEGORY/DESCRIPTION	BASIS FOR TRIP DETERMINATION	WEEKDAY AVERAGE TRIP RATE	WEEKEND AVERAGE TRIP RATE
843 — Auto Parts Sale	Not Available *		
844 — Service Station	No. of Pumps	100.003	
845 — Tire, Battery and Accessory	Not Available *		
846 — Car Wash	Not Available *		
847 — Auto Repair	Not Available *		
848 — Highway Oasis (including truck fuel, minimal trucker and mechanical services)	" " *		
849 — Truck Stop (including food, auto and truck mechanical services, trucker supplies and trucker overnight sleeping accommodations)	Not Available *		
850 — Supermarket	T.G.S.F.	100.003	
851 — Convenience Market	" "	100.003	
870 — Apparel	" "	3.33	
890 — Furniture Store	" "	4.35	
895 — Video Arcade	" "	9.60	
911 — Bank (walk-in)	" "	100.003	
912 — Drive-In Bank	" "	100.003	

913 — Savings and Loan (walk-in) " " 61.00
914 — Drive-In Savings and Loan " " 100.003

Office

630 — Clinic T.G.S.F. 23.79
710A — General Office, Under 100,000 Gross Square Feet (G.S.F.) " 16.31
710B — General Office, 100,000-199,999 G.S.F. " 12.40
710C — General Office, 200,000-299,999 G.S.F. " 11.54
710D — General Office, 300,000-399,999 G.S.F. " 10.425
710E — General Office, 400,000-499,999 G.S.F. " 9.705
710F — General Office, 500,000-599,999 G.S.F. " 9.175
710G — General Office, 600,000-699,999 G.S.F. " 8.775
710H — General Office, 700,000-799,999 G.S.F. " 8.435
710I — General Office, 800,000 and Over " 8.165

LAND USE CATEGORY/DESCRIPTION	BASIS FOR TRIP DETERMINATION	WEEKDAY AVERAGE TRIP RATE	WEEKEND AVERAGE TRIP RATE
714 — Corporate Headquarters Building	"	7.015	
720 — Medical Office Building	"	34.17	
730 — Government Office Building	T.G.S.F.	68.93	
731 — State Motor Vehicles Department	"	16.60	

732 — U.S. Post Office " " 86.78
740 — Civic Center " " 25.00
750 — Office Park USE General Office
760 — Research Center T.G.S.F. 6.09
770 — Business Park " 12.42
910 — Financial Not Available *
915 — Stockbroker " " *
916 — Lending Agency " " *
920 — Real Estate " " *
930 — Insurance T.G.S.F. 11.45

Industrial

110 — General Light Industrial T.G.S.F. 6.97
120 — General Heavy Industrial " 1.50
130 — Industrial Park " 6.97
140 — Manufacturing " 3.85
150 — Warehouse " 4.88
151 — Mini-Warehouse " 2.61
170 — Utilities Employees 1.07
180 — Agricultural Not Available *
860 — Wholesale T.G.S.F. 6.73

NOTES

* Not Available - Indicates that the ITE manual does not contain information for this use. Therefore, the basis for trip determination shall be as set forth
in Section 3.17.040(D).
1 Without Matinees
2 Note: Rate obtained by taking average of maximum and minimum rates of range
3 Note: Rate capped at 100.00
4 Note: Category may be used for permits submitted after January 5, 1996
TGSF - Thousand Gross Square Feet
TGLSF - Thousand Gross Leasable Square Feet
(Ord. 514A (Exhibit A), 1998; Ord. 500, Exhibit B, 1999)

(2)
Supreme Court, U.S.
FILED
DEC 13 2002
OFFICE OF THE CLERK

No. 02-750

In the

Supreme Court of the United States

ROGERS MACHINERY COMPANY, INC.,

Petitioner,

v.

WASHINGTON COUNTY and CITY OF TIGARD,

Respondents.

On Petition for Writ of Certiorari to the Oregon Court of Appeals

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND AGENCIA LA ESPERANZA CORPORATION, INC., IN SUPPORT OF PETITIONER

JAMES S. BURLING
MERIEM L. HUBBARD
Counsel of Record
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Amici Curiae Pacific Legal Foundation and Agencia La Esperanza Corporation, Inc.

17 pp

QUESTION PRESENTED

May a local government exact development fees it has adopted through a legislative process without complying with the "rough proportionality" standards of *Dolan v. City of Tigard*, 512 U.S. 374 (1994)?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

IDENTITY AND INTEREST OF AMICI CURIAE 1

STATEMENT OF THE CASE 3

ARGUMENT 5

I. WHETHER CONSTITUTIONAL TAKINGS STANDARDS APPLY TO LEGISLATIVELY IMPOSED EXACTIONS PRESENTS AN IMPORTANT QUESTION OF REGULATORY TAKINGS LAW 5

II. THE PETITION FOR CERTIORARI DESCRIBES A SPLIT OF AUTHORITY AMONG VARIOUS STATE COURTS, BUT DOES NOT EXPLAIN THAT THE SPLIT ALSO INVOLVES THE LOWER FEDERAL COURTS 10

CONCLUSION 12

TABLE OF AUTHORITIES

Page

Cases

Armstrong v. United States, 364 U.S. 40 (1960) 5

City of Portsmouth v. Schlesinger, 57 F.3d 12 (1st Cir. 1995) 11

Dolan v. City of Tigard, 512 U.S. 374 (1994) ..... passim

Ehrlich v. City of Culver City, 911 P.2d 429 (Cal. 1996) 4, 7

Manocherian v. Lenox Hill Hospital, 643 N.E.2d 479 (N.Y. 1994) 5-6

National Association of Home Builders of the United States v. Chesterfield County, 907 F. Supp. 166 (E.D. Va. 1995), *aff'd*, 1996 U.S. App. LEXIS 18838 (4th Cir. July 30, 1996) 10-11

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) 1, 5-6, 9-10

Palazzolo v. Rhode Island, 533 U.S. 606 (2001) 1

Rogers Machinery, Inc. v. Washington County, 45 P.3d 966 (Or. Ct. App. 2002) 3-4, 8

Rogers Machinery, Inc. v. Washington County, 52 P.3d 1057 (Or. 2002) 4

San Remo Hotel L.P. v. City and County of San Francisco, 41 P.3d 87 (Cal. 2002) 4, 8-9

Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997) 1

Statutes

Wash. County Code ch. 3.17, § 3.17.020 3-4

TABLE OF AUTHORITIES—Continued

Page

Supreme Court Rules

Rule 37 1

Rule 37.6 1

Miscellaneous

Burling, James S., *Development Fees and the Supreme Court's Takings Jurisprudence: A Close Fit?*, ALI-ABA Course of Study Materials, Inverse Condemnation and Related Government Liability (1996) 5

Callies, David L., *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from* Penn Central *to* Dolan, *and What State and Federal Courts are Doing About It*, 28 Stetson L. Rev. 523 (1999) 6

Eagle, Steven J., *Symposium: When Does Retroactivity Cross the Line?* Winstar, Eastern Enterprises *and Beyond: Substantive Due Process and Regulatory Takings: A Reappraisal*, 51 Ala. L. Rev. 977 (2000) ... 9

Huffman, James L., *Colloquium on* Dolan v. City of Tigard*: The Takings Clause Doctrine of the Supreme Court and the Federal Circuit:* Dolan v. City of Tigard*: Another Step in the Right Direction*, 25 Envtl. L. 143 (1995) 6-7

Institute of Transportation Engineers, *Trip Generation* (6th ed. 1997) 2

Reznik, Inna, *The Distinction Between Legislative and Adjudicative Decisions in Dolan v. City of Tigard*, 75 N.Y.U. L. Rev. 242 (2000) 7-8

IDENTITY AND INTEREST OF AMICI CURIAE [1]

Amicus Pacific Legal Foundation (PLF) is a nonprofit, public interest legal foundation that specializes in defending property rights and other individual liberties. For more than 25 years, PLF has been litigating in support of the rights of individuals to make reasonable use of their private property. PLF attorneys have been before this Court on three occasions representing individuals whose right to use their property was unlawfully denied by government agencies. *See Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). And PLF has participated as amicus curiae in nearly every major real property takings case heard by this Court in the past 25 years.

Amicus Agencia La Esperanza Corporation, Inc. (Esperanza) is a privately held California corporation. Esperanza is the petitioner in a petition for writ of certiorari, pending before this Court, that raises precisely the same issue as that presented in this case. *See Agencia La Esperanza Corporation, Inc. v. Orange County Board of Supervisors, et al.*, Supreme Court Case No. 02-638.

The facts underlying Esperanza's petition are simple. Esperanza was assessed transportation mitigation fees as a

---

[1] Pursuant to Supreme Court Rule 37, Pacific Legal Foundation and Agencia La Esperanza Corporation, Inc., respectfully submit this brief amicus curiae in support of Rogers Machinery. All parties consented to the filing of this brief and their letters of consent have been lodged with the Clerk of this Court.

Pursuant to Supreme Court Rule 37.6, Pacific Legal Foundation and Agencia La Esperanza Corporation, Inc., affirm that no counsel for any party in this case authored this brief in whole or in part; and furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

condition of receiving a permit to build a 110,414-square-foot self-storage facility[2] in Orange County, California. The fees, totaling $194,880, were imposed under two legislatively adopted fee programs. Under both fee programs, the amounts of the fees imposed on new development are based on general factors that do not account for differences in traffic generation rates for various types of commercial development. The fees are calculated based on the use (commercial or residential), the gross square footage, and the area of benefit as defined in the fee programs. So commercial, nonresidential development projects, such as Esperanza's self-storage facility, are assessed fees at the same amount per square foot as all other nonresidential uses in the same area of benefit. The fee programs do not account for the fact that self-storage facilities generate significantly less traffic than do most other types of commercial development.

The result is that Esperanza was assessed development impact fees far exceeding the per trip amount assessed on commercial facilities that generate far more traffic. Under one of the fee programs, Esperanza's fee is more than 12.5 times greater per trip generated than the fee assessed against commercial projects of a similar size in the same area of benefit.

In an action challenging the sufficiency of the relationship of the development fees and the effects attributable to its development project, Esperanza argued that the fee structure amounts to an unconstitutional taking and that the "rough proportionality" standard of *Dolan v. City of Tigard*, 512 U.S. 374 (1994), is the proper test for determining the

---

[2] The Institute of Transportation Engineers refers to self-storage facilities as mini-warehouses and defines them as buildings in which a number of storage units or vaults are rented for the storage of goods. *See* Institute of Transportation Engineers, *Trip Generation* (6th ed. 1997).

constitutionality of the relationship between the fees and the impact of the project. The California Court of Appeal rejected both arguments and held that *Dolan*'s rough proportionality test does not apply to legislatively imposed exactions.[3] To challenge that ruling, Esperanza filed a petition for a writ of certiorari.

Amici believe that property owners and local governments would benefit from a ruling by this Court on the question of whether the "rough proportionality" standard of *Dolan v. City of Tigard*, 512 U.S. 374, applies to legislatively imposed exactions.

STATEMENT OF THE CASE

The facts of the case are set forth in *Rogers Machinery, Inc. v. Washington County*, 45 P.3d 966 (Or. Ct. App. 2002). Rogers Machinery Company, Inc., maintained its headquarters in a single building located in Tigard, Oregon, until that building became outdated and overcrowded. *Id.* at 967. In 1997, Rogers sought a permit to construct a second building on the same property so that some employees could be moved from the existing building to the new building. *Id.* No additional employees were to be hired, and it was undisputed that the new space would not increase traffic to and from the site. Petition for Writ of Certiorari at 3.

Although Rogers' new building would generate no new traffic, Rogers was forced to pay a Traffic Impact Fee (TIF) of approximately $37,000 before it could obtain a building permit. *See Rogers Machinery*, 45 P.3d at 967-68. The TIF, imposed on all new development pursuant to County ordinance, was adopted to "ensure that new development contributes to extra capacity transportation improvements needed to accommodate additional traffic generated by such development." Wash.

---

[3] The decision of the California Court of Appeal is unreported, as is the California Supreme Court's denial of review.

County Code, ch. 3.17, § 3.17.020. *Rogers Machinery*, 45 P.3d at 968. The TIF ordinance is jointly administered by Washington County and the City of Tigard, and requires that the fees assessed on new development are calculated according to a set formula. *Id.* at 967-69.

Rogers objected to the fee imposed on its project, and argued that the fee violates the Fifth Amendment to the United States Constitution because it does not meet the "rough proportionality" standard of *Dolan v. City of Tigard*, 512 U.S. 374. *Id.* at 968. The Washington County Hearings Officer, the Washington County Circuit Court, and the Oregon Court of Appeals disagreed. *Id.*

The Oregon Court of Appeals held that legislatively imposed and calculated development fees are not subject to *Dolan*. *Rogers Machinery, Inc. v. Washington County*, 45 P.3d at 983. The court agreed with the California Supreme Court's contention in *Ehrlich v. City of Culver City*[4] and *San Remo Hotel L.P. v. City and County of San Francisco*[5] that *Dolan* only applies "with the sort of governmental leveraging that can arise in case-by-case adjudicatory imposition of development conditions." *Rogers Machinery*, 45 P.3d at 982.

The Oregon Supreme Court denied review. *Rogers Machinery, Inc. v. Washington County*, 52 P.3d 1057 (Or. 2002).

---

[4] 911 P.2d 429 (Cal. 1996).

[5] 41 P.3d 87 (Cal. 2002).

ARGUMENT

I

WHETHER CONSTITUTIONAL TAKINGS STANDARDS APPLY TO LEGISLATIVELY IMPOSED EXACTIONS PRESENTS AN IMPORTANT QUESTION OF REGULATORY TAKINGS LAW

A development exaction is a demand that a property owner give up something of value as a condition of obtaining government approval to build on property. Exactions can take the form of land, an interest in land, or money. *See* James S. Burling, *Development Fees and the Supreme Court's Takings Jurisprudence: A Close Fit?*, ALI-ABA Course of Study Materials, Inverse Condemnation and Related Government Liability (1996). And exactions can be imposed on an individual and discretionary basis or by legislation of general applicability. Regardless of their form or source, requiring that exactions have a nexus (*see Nollan v. California Coastal Commission*, 483 U.S. at 837), and are subject to "rough proportionality" under *Dolan v. City of Tigard*, 512 U.S. 374, is perfectly sensible and effective to insulate landowners from overreaching governmental entities that might otherwise take unfair advantage of persons during the application process.

In *Armstrong v. United States*, 364 U.S. 40, 49 (1960), this Court explained that "[t]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." The nexus and rough proportionality requirements provide a means to ensure that the purpose of the Fifth Amendment is fulfilled. *See, e.g., Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479 (N.Y. 1994) (The New York Court of Appeals held that a rent stabilization ordinance failed the constitutional test because it created an "indeterminate and unjustifiable burden draped

disproportionately on the particular owners' shoulders." *Id.* at 483.). *See also* James L. Huffman, *Colloquium on* Dolan v. City of Tigard*: The Takings Clause Doctrine of the Supreme Court and the Federal Circuit:* Dolan v. City of Tigard*: Another Step in the Right Direction*, 25 Envtl. L. 143, 150 (1995) ("The takings clause [protects against majoritarian tyranny] by insisting that the costs imposed by government use or regulation of private property are borne by all to whom the benefits inure." *Id.* at 152.).

There is no doctrinal basis to limit the application of *Dolan* to administrative or quasi-judicial government acts. Legal scholars argue that neither the Fifth Amendment nor the takings precedents support a legislative/adjudicative distinction between exactions, and those scholars urge an integrated doctrine that recognizes the constitutional equivalency of all exactions. *See* Huffman, *supra*, at 150 (Dean Huffman acknowledges the important procedural implications of a legislative/adjudicative distinction, but goes on to say that "it is not at all clear that the distinction should have any relevance with respect to the substantive protection of property rights. From the point of view of the property owner, the consequence of a taking is the same whether done by the legislative, executive, or judicial branches of government. The Fifth Amendment draws no such distinction."). *See also* David L. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from* Penn Central *to* Dolan, *and What State and Federal Courts are Doing About It*, 28 Stetson L. Rev. 523, 575 (1999) (Land development conditions require a legitimate state interest, nexus and proportionality. "These rules extend to exactions beyond physical dedications even though *Nollan* and *Dolan* were land dedication cases. . . . Why should a common legislative scheme of conditions escape scrutiny if it lacks either nexus or proportionality? An unconnected or disproportionate condition is extortionate, regardless." *Id.*).

Those courts that distinguish between legislative and adjudicative exactions claim that when exactions are imposed in the form of generally applicable legislation, property owners do not encounter the heightened risk of extortionate use of the government's police power to impose unconstitutional exactions. *See, e.g.*, *Ehrlich v. City of Culver City*, 911 P.2d at 444. Legal scholars disagree. *See* Inna Reznik, *The Distinction Between Legislative and Adjudicative Decisions in* Dolan v. City of Tigard, 75 N.Y.U. L. Rev. 242, 251 (2000) ("The extortion and inequitable economic burdens that local governments potentially impose on landowners through administrative processes can occur just as easily in the legislative context." *Id.* at 267.); Huffman, *supra*, at 146 (Government is reluctant to compensate property owners impacted by regulation. And, "[t]he drafters of the takings clause understood that we should expect nothing different from government. Absent judicial enforcement of the takings clause, governments have every incentive to take private property without compensation. Democracy will deter such wealth redistribution only when large numbers of people are likely to bear the costs. The takings clause exists, along with the rest of the Bill of Rights, because the constitutional framers understood the inevitability of the tyranny of the majority in an unlimited democracy." *Id.*).

One commentator argues that local legislative bodies acting in their legislative capacity may be more likely to use the police power to exact unconstitutional conditions than in the adjudicative setting. Reznik, *supra*, at 270-72. Indeed, it is highly probable that grossly disproportionate exactions will result from broadly applicable, generalized exaction programs. Those types of programs do not allow government to consider widely varying individual circumstances, and do not provide a means to accommodate those who do not fit within a program's general categories.

Parties to adjudicative proceedings have significant procedural rights that may enhance equal treatment for competing interests. Reznik, *supra*, at 273. But the only safeguard against legislatively imposed extortionate exactions is found in the political process. The California Supreme Court said that

> [w]hile legislatively mandated fees do present some danger of improper leveraging, such generally applicable legislation is subject to the ordinary restraints of the democratic political process. A city council that charged extortionate fees for all property development, unjustifiable by mitigation needs, would likely face widespread and well-financed opposition at the next election.

San Remo Hotel L.P. v. City and County of San Francisco, 41 P.3d at 105. *See Rogers Machinery v. Washington County*, 45 P.3d at 982, wherein the Court of Appeals of Oregon cited the quoted language.

While the democratic political process may, as the California Supreme Court suggested, protect against "extortionate fees for all property development," it is doubtful that the political process would work as efficiently to remove government officials who impose extortionate fees on only some forms of property development. Developers are exactly the kind of minority whose interests might be ignored by the majority. And they are oftentimes not local and thus are unable to participate in the local political process. *See* Reznik, *supra*, at 271-72. The Takings Clause is intended to protect against that sort of majoritarian oppression.

In the complex area of land use regulation there is no generally recognized clear distinction between legislative and adjudicative actions on which to draw a constitutional line. *See* Reznik, *supra*, at 257-66 (The blending of legislative, administrative, and judicial functions is common in land use

decisionmaking.). *And see* Steven J. Eagle, *Symposium: When Does Retroactivity Cross the Line?* Winstar, Eastern Enterprises *and Beyond: Substantive Due Process and Regulatory Takings: A Reappraisal*, 51 Ala. L. Rev. 977, 1042 (2000) ("The problem of discerning which statutes are legislative and which are adjudicative for purposes of a Dolan analysis is apt to be open-ended and chronic.").

Significantly, both *Nollan* and *Dolan* involved a mixture of legislative and adjudicative government action. In *Nollan*, this Court noted the Coastal Commission's "public announcement of its intention to condition the rebuilding of houses on the transfer of easements." 483 U.S. at 833 n.2. In other words, just as in the present case, the Coastal Commission's statewide exaction policy was applied on a uniform and consistent basis. The statutory requirement in *Dolan* that landowners contribute to transportation infrastructure was also generally applicable and was adopted through legislative action. *Dolan*, 512 U.S. at 378 (noting that the community development code "requires that new development facilitate this plan by dedicating land for pedestrian pathways").

The use of arbitrary distinctions, like the legislative/adjudicative distinction, to apply a less exacting standard of review to legislatively imposed exactions leads to arbitrary results. If an exaction is imposed on one property owner, it is subject to the nexus and rough proportionality standards. But if an identical exaction is imposed on a class of property owners, it is not. "The nature of the wrong is not different or less abusive to its victims, but the scope of the wrong is multiplied many times over." *San Remo Hotel v. City and County of San Francisco*, 41 P.3d at 124 (Brown, J., dissenting).

Local governments will prefer to utilize their legislative power to impose exactions if such exactions are not subject to

the same exacting standard as applies to adjudicative exactions. And local governments will use their legislative powers to circumvent the constitutional protections provided to property owners in *Nollan* and *Dolan*.

II

THE PETITION FOR CERTIORARI DESCRIBES A SPLIT OF AUTHORITY AMONG VARIOUS STATE COURTS, BUT DOES NOT EXPLAIN THAT THE SPLIT ALSO INVOLVES THE LOWER FEDERAL COURTS

Petitioner discusses the nationwide split of authority among the state courts on the question of *Dolan*'s applicability to legislatively adopted exactions. Petition for Writ of Certiorari at 5-10. Amici add that the split also involves two lower federal courts, both of which refuse to let the method by which exactions are imposed dictate the constitutional test to be applied in a regulatory takings case.

In *National Association of Home Builders of the United States v. Chesterfield County*, 907 F. Supp. 166, 167 (E.D. Va. 1995), *aff'd*, 1996 U.S. App. LEXIS 18838 (4th Cir. July 30, 1996), the district court upheld a Chesterfield County Policy adopted to guide the county's acceptance of proffers allowed by an earlier-adopted ordinance. The money from the proffers was to be used to offset the increased cost of specific capital improvements necessitated by proposed residential developments. *Id.* at 168-69. The policy, applicable to all residential rezoning requests, established a method for calculating the maximum proffer that could be tendered with a rezoning application. *Id.* at 168.

The Home Builders asserted that, on its face, the proffer policy "violates the Fifth Amendment to the United States Constitution's prohibition on taking of property without just compensation." *Id.* at 167. The court applied the *Dolan*

standard despite the legislative origin of the exaction and found the standard was satisfied. In the words of the court:

> there is no reason apparent on the face of the Policy why the proffers required, if any, can not [be] determined in an "individualized" manner and fixed at an amount "roughly proportional" in "nature and extent to the impact of the proposed development" according to the test set out in *Dolan v. Tigard.*

Id. at 169.

City of Portsmouth v. Schlesinger, 57 F.3d 12 (1st Cir. 1995), involved a challenge to a low-income housing fee imposed when the owner of the site of some low-income apartments sought permission to replace the apartments with new condominiums. *Id.* at 12-13. The developers negotiated with city authorities to obtain a zoning change, and those negotiations resulted in several draft ordinances. *Id.* at 13. The draft ordinance ultimately approved by the city planning board provided for a payment or impact fee "designed to compensate the City for the impact upon it expected to result from the loss of low income housing." *Id.* at 13. And the parties negotiated more impact fees to be paid to the city by the developers in accordance with the terms of a promissory note. *Id.* at 13.

The challenge to the fees was burdened with a statute of limitations issue that dominated the opinion, but the court noted that undisputed facts showed that "no rational nexus existed between the amount of the Developers' . . . [fee] and any burden imposed on the City due to the zoning change." *Id.* at 14. The court uses the term "rational nexus" as a *Dolan*-style assessment of the relationship between the amount of a fee and the burdens imposed on a municipality by the development. "The district court . . . went on to find factually that no rational nexus existed here as between the $2,500,000 payment sought by the City and any demonstrable burden to be borne by it due to the zoning change." *Id.* at 13.

These lower federal court decisions conflict with the decision of the Oregon Court of Appeals in this case and all of the other state court decisions that reject the applicability of *Dolan* to legislatively imposed exactions. Only this Court can resolve the conflict.

CONCLUSION

Amici respectfully urge this Court to resolve the conflict between the lower state and lower federal courts and decide whether the "rough proportionality" standard of *Dolan* applies to all exactions, including legislatively imposed exactions.

DATED: December, 2002.

Respectfully submitted,

JAMES S. BURLING
MERIEM L. HUBBARD
Counsel of Record
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Amici Curiae Pacific Legal Foundation and Agencia La Esperanza Corporation, Inc.

Supreme Court, U.S.
FILED
DEC 12 2002
OFFICE OF THE CLERK

No. 02-750 (3)

In The

Supreme Court of the United States

ROGERS MACHINERY COMPANY, INC.,

Petitioner,

v.

CITY OF TIGARD, AND
WASHINGTON COUNTY,

Respondents.

On Petition For A Writ Of Certiorari To The
Oregon Court of Appeals

BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF HOME BUILDERS AND OREGON BUILDING INDUSTRY ASSOCIATION IN SUPPORT OF PETITIONER

JON W. LUTHER
THOMAS JON WARD*
NATIONAL ASSOCIATION
OF HOME BUILDERS
1201 15TH STREET, NW
WASHINGTON, DC 20005
(202) 266-8200

Attorneys for Amici Curiae

** Counsel of Record*

24 pp

TABLE OF CONTENTS

Page(s)

INTERESTS OF THE AMICI CURIAE 1

TABLE OF AUTHORITIES iii

SUMMARY OF ARGUMENT 3

REASONS FOR GRANTING THE WRIT.....5

I. DOLAN'S HEIGHTENED SCRUTINY SHOULD BE APPLIED TO DEVELOPMENT EXACTIONS REGARDLESS OF WHETHER AN EXACTION IS IMPOSED LEGISLATIVELY OR THROUGH A QUASI-ADJUDICATIVE PROCEEDING.5

A. DOLAN'S ANALYSIS IS A LOGICAL FRAMEWORK UNDER WHICH TO TEST THE CONSTITUTIONALITY OF EXACTIONS IRRESPECTIVE OF WHICH BRANCH OF GOVERNMENT IMPOSES THEM.....8

B. OTHER COURTS HAVE APPLIED DOLAN EFFECTIVELY TO LEGISLATIVELY-ENACTED EXACTIONS.....10

II. DOLAN'S HEIGHTENED SCRUTINY SHOULD APPLY TO ALL GOVERNMENTAL EXACTIONS REGARDLESS OF WHETHER THE EXACTION TAKES THE FORM OF A PHYSICAL DEDICATION OR A NONPOSSESSORY IMPACT FEE.....12

III. SPIRALING DEVELOPMENT IMPACT FEES IMPOSED BY LOCAL GOVERNMENTS ARE A LEADING CAUSE OF INCREASED HOUSING COSTS AND ARE A CONTINUING THREAT TO HOUSING AFFORDABILITY.....15

CONCLUSION.....17

TABLE OF AUTHORITIES

CASES Page(s)

Agins v. City of Tiburon, 447 U.S. 255 (1980)..... 2, 8

Amoco Oil Co. v. Village of Schaumburg, 661 N.E.2d 380 (Ill. App. Ct. 1995).....11

Armstrong v. United States, 364 U.S. 40 (1960).....5, 12

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999) 2

Concrete Pipe and Prods. v. Construction Laborers Pension Trust, 508 U.S. 602 (1993).....12

Dolan v. City of Tigard, 512 U.S. 374 (1994) .....*passim*

Ehrlich v. City of Culver City, 911 P.2d 429 (Cal.), *cert. denied*, 519 U.S. 929 (1996).....7, 13, 14

Home Builders Ass'n of Dayton and the Miami Valley v. City of Beavercreek, 729 N.E.2d 349 (Ohio 2000).....11, 13

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).....8

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 2

MacDonald, Sommer & Frates v. Yolo County,
477 U.S. 340 (1986) 2

Nollan v. California Coastal Comm'n,
483 U.S. 825 (1987) ..... *passim*

Northern Illinois Home Builders Ass'n, Inc. v. County of Du Page, 649 N.E.2d 384 (Ill. 1995)..... 11

Palazzolo v. Rhode Island,
533 U.S. 606 (2001)..... 2

Parking Ass'n of Georgia v. City of Atlanta,
450 S.E.2d 200 (Ga. 1994), *cert denied*, 515 U.S. 116 (1995)..... 5, 6

Penn Central Transp. Co. v. City of New York,
438 U.S. 104 (1978)..... 8, 12

Phillips v. Washington Legal Foundation,
524 U.S. 156 (1998)..... 12

Rogers Machinery, Inc. v. Washington County,
45 P.3d 966 (Or. Ct. App.), *petition for review to the Supreme Court of Oregon denied*,
52 P.3d 1057 (Or. 2002)..... 6, 14

San Diego Gas & Elec. Co. v. City of San Diego,
450 U.S. 621 (1981) 2

San Remo Hotel L.P. v. City and County of San Francisco, 41 P.3d 87 (Cal. 2002)..... 7, 14

Suitum v. Tahoe Reg'l Planning Agency,
520 U.S. 725 (1997) 2

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency, 122 S. Ct. 1465 (2002).....2

Trimen Development Co. v. King County, 877 P.2d 187 (Wash. 1994).....11

Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) 2

Yee v. City of Escondido, 503 U.S. 519 (1992).....2

OTHER

Fred P. Bosselman, *Dolan Works* in *Taking Sides on Takings Issues: Public and Private Perspectives*, 345 (Thomas E. Roberts, Editor, 2002).....9, 10, 13

John J. Delaney, *What Does it Take To Make a Take? A Post-Dolan Look at the Evolution of Regulatory Takings Jurisprudence in the Supreme Court*, 27 Urb. Law 55 (1996).....9

Home Buyers Face Skyrocketing Development Fees, Nation's Building News (National Ass'n of Home Builders, Washington, D.C.) Aug. 19, 2002, at 8.....16

Robert Lincoln, *Executive Decisionmaking by Local Legislatures in Florida: Justice, Judicial Review and the Need For Legislative Reform*, 25 Stetson L. Rev. 627 (1996).....6

National Association of Home Builders, *Building a Balance: Housing Affordability & Environmental Protection*, (2002).....15

Inna Reznik, *The Distinction Between Legislative and Adjudicative Decisions in* Dolan v. City of Tigard, 75 N.Y.U. L. Rev. 242, 261 (2000).....6, 7

Edward H. Ziegler, *Development Exactions and Permit Decisions: The Supreme Court's Nollan, Dolan, and Del Monte Dunes Decisions,* 34 Urb. Law 155 (2002).....14

INTERESTS OF THE AMICI CURIAE

The National Association of Home Builders ("NAHB") and the Oregon Building Industry Association ("OBIA") have received the parties' written consent to file this brief as amici curiae in support of Petitioner. Letters of consent have been filed with the Clerk of the Court.[1]

Amici curiae wish to bring to the Court's attention a conflict exemplified by Petitioner's case: confusion exists in numerous courts below as to the proper application of *Dolan v. City of Tigard's* legal standard to legislatively-enacted development exactions, including impact fees. This Court's grant of the petition for a writ of certiorari would define the scope of *Dolan* as it pertains to all development exactions, thereby removing the uncertainty in the courts below.

The NAHB represents over 205,000 builder and associate members throughout the United States. Its members include not only people and firms that construct and supply single-family homes, but also apartment, condominium, multi-family, commercial and industrial builders, land developers, and remodelers. It is the voice of the American shelter industry. The NAHB, therefore, is concerned with any judicial decision that calls into question the legal remedies available to NAHB's members, especially when any such remedies are restricted by a state or federal court. Protecting our members' fundamental constitutional rights, particularly involving

---

[1] Pursuant to Rule 37.6 of this Court, amici states that its counsel authored this brief and amici paid for it. This brief was not written in whole or part by counsel for a party, and no one other than amici made a monetary contribution to its preparation.

matters related to takings and just compensation, has long been an integral part of our activities.

NAHB has been before the Court as an amicus curiae or as "of counsel" to the landowner in a number of cases. These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); and *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, et al.*, 122 S. Ct. 1465 (2002).

Oregon Building Industry Association (OBIA) is a trade association representing residential and light-commercial contractors, subcontractors and suppliers. Its membership of more than 4,200 member companies makes it the largest construction-related trade association in Oregon. Established in 1950, it is affiliated with the National Association of Home Builders in Washington, D.C. and has fifteen local affiliates in Oregon.

SUMMARY OF ARGUMENT

By concluding that *Dolan's* "heightened scrutiny" test[2] does not extend to a legislatively imposed traffic impact fee, the Oregon Court of Appeals improperly limits *Dolan's* applicability in the context of development exactions and further confuses this area of takings jurisprudence. The Court of Appeals is not alone; much uncertainty exists in Federal and state courts below as to the professed "legislative-adjudicative" distinction relative to the application of *Dolan*. Further complicating the issue, some courts apply *Dolan* to government-imposed dedications or other physical exactions, yet refrain from applying *Dolan* to impact fees or comparable monetary exactions.

However, the safeguards of *Dolan's* heightened scrutiny test must apply equally to all exactions, because regardless of the source of the exaction, and irrespective of the physical-monetary distinction, the underlying property interests subject to the exaction are indistinguishable under the Constitution. In fact, the protections of the Fifth Amendment's takings clause, which extend to all private property interests, are blind to all purported distinctions.

Choosing not to extend *Dolan* to the "legislatively" determined traffic impact fee, the Court of Appeals explains away the need for *Dolan's* heightened scrutiny where there is a "generally applicable development fee imposed on a broad range of specific, legislatively

---

[2] *See infra* at 8, for a discussion of the relationship between *Nollan's* "essential nexus" and *Dolan's* "rough proportionality" legal tests for evaluating the constitutionality of governmental development exactions. The tests, which require a heightened level of legal scrutiny for government-imposed development exactions, are hereinafter referred to as "*Dolan*" or "heightened scrutiny" tests.

determined subcategories of property through a scheme that leaves no meaningful discretion either in the imposition or in the calculation of the fee." Apparently, the Court of Appeals is satisfied that this type of legislative enactment is imbued with a readymade buffer that will prevent against the type of regulatory leveraging that would otherwise beg for a *Dolan* analysis.

However, the Court of Appeals misses the mark. It ignores a glaring reality in the realm of land use and development law: most land use policy, which is made at the local level, is infused with a mixture of "legislative" and "quasi-adjudicative" decision-making. Development fees that are calculated and enacted "legislatively" are nevertheless applied on an individual, case-by-case basis; the risk of regulatory leveraging is present regardless of how the government entity or exaction is categorized. The safeguards of *Dolan's* heightened scrutiny test should not be sacrificed to an inexact distinction between local governmental bodies.

Moreover, the Court of Appeals notes that monetary exactions that are imposed and calculated on a discretionary and adjudicatory basis are worthy of a *Dolan* analysis but that the same fees applied through generally applicable legislation are not. The Court of Appeals intimates that the risk of governmental leveraging associated with the case-by-case adjudicatory imposition of monetary exactions is not pervasive in the context of legislatively authorized, generally applicable fees.

But, to the property owner who is obligated to swallow his poison, regardless of the form of the exaction, or whether it is rendered legislatively or administratively, the potential hazard is the same: a taking is a taking. It matters not to him, or to the Constitution, the identity of

the taker, nor the form of the taking. With the safeguards of *Dolan*, the property owner at least stands the chance of avoiding being the proverbial owner who is "unreasonably forced to bear the regulatory burdens of many."[3]

For these reasons, this Court should grant certiorari to define the application of *Dolan*, which in turn would lend more certainty to the property development approval process.

REASONS FOR GRANTING THE WRIT

I. DOLAN'S HEIGHTENED SCRUTINY SHOULD BE APPLIED TO DEVELOPMENT EXACTIONS REGARDLESS OF WHETHER AN EXACTION IS IMPOSED LEGISLATIVELY OR THROUGH A QUASI-ADJUDICATIVE PROCEEDING

"A city council can take property just as well as a planning commission can." This admonition from Justice Thomas's dissent in *Parking Ass'n of Georgia v. City of Atlanta* truly cuts to the heart of the debate over the application of *Dolan*. Recognizing that it makes no good sense to hold a takings analysis hostage based on the *type* of governmental entity responsible for the potential taking, Justice Thomas, with whom Justice O'Connor joined in dissent, spied the potential confusion in this area of the law well in advance of the *Rogers Machinery* case. *Parking Ass'n of Georgia v. City of Atlanta*, 450 S.E.2d 200 (Ga. 1994), *cert. denied*, 515 U.S 1116, 1117-1118 (1995) (Thomas, J., dissenting from denial of certiorari).

---

[3] *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

Given the interlocking roles of local legislative and quasi-adjudicative bodies, the "distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference." *Id.* at 1119. In practice, scores of local land use decisions are made daily wherein the local decision-maker arrives at the decision after performing a hybrid of legislative, administrative, and quasi-judicial functions. The Court of Appeals, in withholding the application of *Dolan* to a legislatively enacted traffic impact fee,[4] fails to recognize that local governments do not follow strict notions of separations of powers requiring independent legislative, executive, and judicial branches with distinct roles.[5]

In a well-researched article covering this area of the law, one commentator notes the frequency with which local legislative bodies perform various administrative functions and administrative bodies exhibit legislative qualities, thus rendering any formal distinctions "ineffective in practice." *See*, Inna Reznik, *The Distinction Between Legislative and Adjudicative Decisions in* Dolan v. City of Tigard, 75 N.Y.U. L. Rev. 242, 261 (2000). Furthermore, disagreement even exists amongst the courts in determining which decisions are "legislative" and which are "adjudicative." *Id.* at 258.

---

[4] *Rogers Machinery, Inc. v. Washington County*, 45 P.3d 966 (Or. Ct. App.), *petition for review to the Supreme Court of Oregon denied*, 52 P.3d 1057 (Or. 2002).

[5] *See*, Robert Lincoln, *Executive Decisionmaking by Local Legislatures in Florida: Justice, Judicial Review and the Need for Legislative Reform*, 25 Stetson L. Rev. 627 (1996), for an interesting discussion detailing how local legislative bodies may sit in an executive or a quasi-judicial capacity to decide how regulations should be applied in particular cases.

To illustrate this point, the author uses the example of rezoning. Generally, the power to rezone is reserved to locally-elected legislative bodies. However, even though adopted by the legislative body like other legislation, rezonings that amend the text or map of a zoning ordinance are normally site specific. Unlike typical legislative enactments, which are widely applicable, and which impact large numbers of parties, these rezonings rely on case-specific facts and often apply to a single party. What happens in practice is that the local legislative entity, through its exclusive power to rezone, renders a quasi-judicial decision limited to the sole applicant for rezoning. Reznik, *supra* at 261. (citations omitted).

To this end, the Court of Appeals' decision[6] rests upon an exaggerated partition between the local governmental bodies that enact and apply impact fees. In withholding the application of *Dolan's* analysis to the impact fee imposed upon Petitioner, the Court of Appeals casts a blind eye to the potential for "regulatory leveraging" that can easily take place at the legislative level. In reality, "[L]ocal government structure combines legislative and administrative functions, and the land use process relies heavily on administrative discretion and flexible piecemeal decisionmaking, making it difficult for courts to determine when a decision is sufficiently legislative in character." Reznik, *supra*, at 247-248. Thus, *Dolan* must be read in conformity with the realities of the local land use process in order to ensure the protection of all private property rights under the Constitution.

---

[6] The Court of Appeals cites the "distinction" raised in *Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal.), *cert. denied*, 519 U.S. 929 (1996) and *San Remo Hotel L.P. v. City and County of San Francisco*, 41 P.3d 87 (Cal. 2002) as justification for applying *Dolan* only to monetary exactions that are imposed and calculated on a discretionary and adjudicatory basis.

When *Dolan* is applied to all development exactions, regardless of their source, courts are spared the burden of sorting through the "legislative-adjudicative" morass and property owners are accorded a fair measure of constitutional protection.

A. DOLAN'S ANALYSIS IS A LOGICAL FRAMEWORK UNDER WHICH TO TEST THE CONSTITUTIONALITY OF EXACTIONS IRRESPECTIVE OF WHICH BRANCH OF GOVERNMENT IMPOSES THEM

By its very nature, *Dolan's* "heightened scrutiny" test is well-conceived to evaluate the constitutionality of development exactions that are imposed either by legislative or quasi-adjudicative fiat.

Unlike "conventional" takings, which might result from either the government's actual physical invasion or occupation of property,[7] or the government's noninvasive, regulatory restriction of a property owner's intended use of the property,[8] the taking in *Dolan* concerned development conditions that required the property owner to "dedicate" a

---

[7] Commonly referred to as a *per se* taking. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

[8] Also generally known as a "regulatory" taking. *See, e.g., Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978) for a list of three factors often used to test if a regulation has gone "too far" so as to become a taking; *See also, Agins v. City of Tiburon*, 447 U.S. 255 (1980) (compensable taking occurs where a regulation either "fails to substantially advance a legitimate state interest" or where it "deprives an owner of economically viable use of his property"). The exaction imposed in *Dolan* was both "regulatory" and "*per se*" in that the government conditioned approval on the property owner's obligation to dedicate private property for public use.

portion of her property in order to proceed with development. *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Building upon this Court's previous ruling in *Nollan v. California Coastal Commission*,[9] which required that there be an "essential nexus" between a government-conditioned dedication and the government's interest in imposing it, this Court in *Dolan* developed the "rough proportionality" test, which requires that there be a "rough proportionality" between the projected impacts of the development and the exaction imposed upon the property owner as a condition of development. *Dolan*, 512 U.S. at 391. While no precise mathematical calculation is required, the burden rests with the government to make "some sort of individualized determination" that the required dedication is related "both in nature and extent" to the impact of the proposed development." *Id.*

Essentially, *Nollan* ("essential nexus") and *Dolan* ("rough proportionality") constitute two separate tests in the takings analysis; however, because the essential nexus test announced in *Nollan* was further enhanced and refined by *Dolan*,[10] the legal standard discussed herein is referred to as "*Dolan's*" heightened scrutiny. Taken together, the tests represent an effective method under which to test the constitutionality of all land use exactions.

Applying heightened scrutiny to *both* legislatively-enacted and quasi-adjudicative exactions is logical and necessary. In a recent article emphasizing the merits of *Dolan*, Professor Fred Bosselman explains why *Dolan* makes sense:

---

[9] 483 U.S. 825 (1987).

[10] *See*, John J. Delaney, *What Does It Take To Make a Take? A Post-Dolan Look at the Evolution of Regulatory Takings Jurisprudence in the Supreme Court*, 27 Urb. Law 55 (1996).

> [T]he *Dolan* test is logical and works well, not because of the brilliant constitutional analysis of the Supreme Court, but because the Court simply followed the body of law set down by most of the state courts before it ... it is logical in its outcome; and it seems to work reasonably well for both developers and local governments.

Fred P. Bosselman, *Dolan Works* in *Taking Sides on Takings Issues: Public and Private Perspectives*, 345, 353 (Thomas E. Roberts, editor, 2002).

Bosselman emphasizes that if the *Dolan* test is applicable only to quasi-adjudicative exactions, it will provide a strong incentive for cities to impose all impact fees legislatively to reduce the risk associated with quasi-adjudicative exactions, and will encourage cities to pick any level of fee they choose because the *Dolan* test does not apply. This is likely to produce fees that are "unfair to some or all developers." Bosselman, *supra* at 348. Moreover, were *Dolan's* heightened scrutiny applicable only to quasi-adjudicative proceedings, cities would be encouraged to impose impact fees "without the careful cost-benefit analysis the *Dolan* test requires," which may produce arbitrary results for the developer. *Id.* Thus, unless *Dolan* is applied to legislatively-imposed impact fees or other exactions, vital private property rights will go unprotected solely because of an inexact distinction between local government entities.

B. OTHER COURTS HAVE APPLIED DOLAN EFFECTIVELY TO LEGISLATIVELY-ENACTED EXACTIONS

As Petitioner points out in its Petition for Writ of Certiorari, a host of courts have successfully utilized

Dolan's heightened scrutiny test, or a comparable legal framework, to evaluate the constitutionality of legislatively-imposed development fee exactions:

Compare, Home Builders Ass'n of Dayton and the Miami Valley v. City of Beavercreek, 729 N.E.2d 349, 353 (Ohio 2000) ("dual rational nexus test" adopted by Ohio court for impact fee ordinances applies a "middle level of scrutiny" that considers whether there is a "reasonable connection" between needs and projected growth and between expenditures and benefits); *Northern Illinois Home Builders Ass'n, Inc. v. County of Du Page*, 649 N.E.2d 384 (Ill. 1995) (Illinois court applied the "specifically and uniquely attributable test" to county transportation impact fee ordinance, requiring that local government demonstrate a direct proportionality between exaction imposed on new development and the specifically created need for additional traffic); and *Trimen Development Co. v. King County*, 877 P.2d 187 (Wash. 1994) (Washington Supreme Court applied *Dolan's* 'rough proportionality' analysis to a legislatively adopted park development fee that the county required the developer to pay in lieu of dedication of land for open space). Pet. 6-9.

Dolan is a straight-forward, logical test. It injects a measure of clarity to a process that is often less than clear. By placing limitations on the type and form of exactions to which *Dolan* applies, the Court of Appeals improperly complicates the takings legal landscape. Certainly, a municipality should not be able to insulate itself from a takings challenge "merely by utilizing a different bureaucratic vehicle while expropriating its citizens' property." *Amoco Oil Co. v. Village of Schaumburg*, 661 N.E.2d 380, 390 (Ill. App. Ct. 1995).

II. DOLAN'S HEIGHTENED SCRUTINY SHOULD APPLY TO ALL GOVERNMENTAL EXACTIONS REGARDLESS OF WHETHER THE EXACTION TAKES THE FORM OF A PHYSICAL DEDICATION OR A NONPOSSESSORY IMPACT FEE

In addressing substantive questions of takings liability, this Court applies the same underlying principles whether real or monetary property is at issue. *See, Concrete Pipe and Prods. v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993) (relying on a *Penn Central* analysis in determining whether a taking of monetary property had occurred); *accord, Phillips v. Washington Legal Found.*, 524 U.S. 156, 176 (1998) (Souter, J., dissenting) (employing *Penn Central* analysis to interest income from client trust fund accounts). Moreover, as this Court has clearly articulated, the Constitution's Fifth Amendment taking guarantee prohibits government from "forcing some people alone to bear public burdens, which in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

Implicit in the Court's statement in *Armstrong* is the notion of proportionality. To the property owner or developer confronted with a governmental development condition that "exacts" a portion of his property, or mandates the payment of a development fee as a condition of approval, "proportionality" means everything, or it can mean nothing at all. From the property owner's perspective, there is often little difference between a requirement that he deed over his property through dedication or that he pay an impact fee as a cost of utilizing his property. Arguably, the payment of an impact

fee is the ultimate form of dedication.[11] What truly resonates with the property owner is the threat of deprivation or loss: whether through a dedication of property or a dedication of funds, that which is 'taken' goes to public use at the expense of the private property owner. The private property interest can be taken regardless of its form. As one court stated, "[J]ust as forced easements or zoning reclassifications can inhibit the desired use of property, an unreasonable impact fee may affect the manner in which a parcel of land is developed." *Home Builders Ass'n of Dayton and the Miami Valley v. City of Beavercreek*, 729 N.E.2d 349, 355 (Ohio 2000).

Therefore, without the benefit of *Dolan's* heightened scrutiny analysis, and, more particularly, its "rough proportionality" test, property owners such as Petitioner are severely limited in challenging government-imposed impact fees that are neither fair, nor proportional. In fact, in *Ehrlich v. City of Culver City,*[12] a California case involving a financial exaction, this Court remanded the case "for further consideration in light of *Dolan*," because the Court recognized the logic in applying *Dolan's* heightened scrutiny test to *all* governmental exactions. Instructively, after this Court's remand of *Ehrlich*, the California Supreme Court rejected the proposition that *Nollan* and *Dolan* are entirely without application to monetary exactions, stating that, "[I]t matters little whether the local land use permit authority demands the actual conveyance of land or the payment of a monetary exaction." *Ehrlich v. City of Culver City*, 911 P.2d 429, 444 (Cal. 1996).

---

[11] *See*, Fred P. Bosselman, *supra*, at 347.
[12] 512 U.S. 1231 (1994).

The Oregon Court of Appeals cites *Ehrlich* and the California Supreme Court's subsequent decision in *San Remo Hotel L.P. v. City and County of San Francisco*[13] as standing for the proposition that *Dolan* is limited to physical dedications, or only to those monetary exactions that are calculated and imposed on a discretionary and quasi-adjudicatory basis.[14] However, such a distinction based on the *form* of exaction is not rooted in the realities in which development exactions take place, nor in the history of this Court's treatment of real property and monetary takings cases.

And, it is important to bear in mind that in the regulatory takings context, "analysis of fundamental fairness in allocation of the burdens imposed, secures and implements the original meaning and purpose of the Fifth Amendment."[15] By adopting *Dolan's* heightened scrutiny as the proper constitutional test for all development exactions, a more fair allocation of burdens will indeed be achievable. After all, "[T]he notions of fairness and proportionality are at the heart of all regulatory taking claims."[16]

---

[13] 41 P.3d 87 (Cal. 2002).

[14] *See Rogers Machinery, Inc. v. Washington County*, 45 P.3d 966, 977-978 (Or. Ct. App.), *petition for review to the Supreme Court of Oregon denied*, 52 P.3d 1057 (Or. 2002).

[15] Edward H. Ziegler, *Development Exactions and Permit Decisions: The Supreme Court's Nollan, Dolan, and Del Monte Dunes Decisions*, 34 Urb. Law 155 (2002).

[16] Ziegler, *supra*, at 155.

III. SPIRALING DEVELOPMENT IMPACT FEES IMPOSED BY LOCAL GOVERNMENTS ARE A LEADING CAUSE OF INCREASED HOUSING COSTS AND ARE A CONTINUING THREAT TO HOUSING AFFORDABILITY

Already encountering increases in the categories and amounts of development impact fees being imposed by local governments, property owners view the safeguards of *Dolan* as a necessary check on the government's unlimited regulatory powers. In fact, increased government regulations and attendant fees have been cited as one of the primary factors responsible for the recent spike in housing prices.

For example, a survey conducted recently by the NAHB found that 10 percent of the costs of building a typical new home can be attributed to regulation and regulatory delays and "fees associated with building, plumbing, electrical, ... higher impact analysis fees, and more." *See*, National Association of Home Builders, *Building a Balance: Housing Affordability & Environmental Protection*, (2002). Moreover, some of the fees that developers and builders have long paid, such as charges for tapping into water and sewer systems, have risen in cost disproportionately over the past twenty to thirty years. *Id.* Builders are also being required to pay a larger share of the cost of providing off-site infrastructure improvements such as new schools, fire stations, roads, and other public facilities that benefit an entire community, not just people living in newly-constructed homes. *Id.*

In a telling example, the Home Builders Association of Northern California recently reported that fees imposed in

September, 2002, by the city of Livermore, California, and other local government agencies, amounted to more than $118,000 for several homes being built in a local subdivision, including a new fee of $38,000 per home for the preservation of farmland and open space.[17] This amounts to nearly two-thirds of the $183,280 median price of a home in the adjacent Central Valley of California.[18] Over the 30-year life of a mortgage, the Home Builders Association calculated that the development fees would add nearly $283,000 to the total cost for a home buyer.[19]

While the imposition of development impact fees and other exactions has become a reality for the building industry, unless local governments are obligated to more fully account legally for these fees, the costs of building homes will continue to soar. The lion's share of these costs will ultimately be passed along to consumers. Applying *Dolan* equally to all development exactions protects against the unconstitutional taking of private property through unlimited government regulation, and ensures that exactions are imposed proportionally.

---

[17] *Home Buyers Face Skyrocketing Development Fees*, Nation's Building News (National Ass'n of Home Builders, Washington, D.C.), Aug., 19, 2002, at 8.
[18] *Id.*
[19] *Id.*

CONCLUSION

The National Association of Home Builders and the Oregon Building Industry Association respectfully request that this Court grant the Petition for a Writ of Certiorari to define the scope of *Dolan*.

DATED: December 11, 2002

Respectfully submitted,

Jon W. Luther
Thomas Jon Ward*
National Association
of Home Builders

*Counsel of Record for
Amici Curiae

Supreme Court, U.S.
FILED
DEC 16 2002
OFFICE OF

No. 02-750

In The

Supreme Court of the United States

ROGERS MACHINERY COMPANY, INC.,

Petitioner,

v.

WASHINGTON COUNTY AND CITY OF TIGARD,

Respondents.

On Petition For A Writ Of Certiorari To The Oregon Court Of Appeals

RESPONDENTS' BRIEF IN OPPOSITION

DAN R. OLSEN
Counsel of Record
LORETTA S. SKURDAHL
WASHINGTON COUNTY COUNSEL
155 N. First Avenue, Suite 340
Hillsboro, Oregon 97124
(503) 846-8747
Attorneys for Respondent Washington County

TIMOTHY V. RAMIS
GARY FIRESTONE
RAMIS CREW CORRIGAN & BACHRACH LLP
1727 NW Hoyt Street
Portland, Oregon 97209
(503) 222-4402
Attorneys for Respondent City of Tigard

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Is a tax or legislatively set fee subject to the rough proportionality standard announced in *Dolan v. City of Tigard*, 512 U.S. 374 (1994)?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
COUNTER-STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	3
REASONS FOR DENYING REVIEW	5
I. The Oregon Court of Appeals' Decision Was Correct and Consistent with this Court's Takings Cases	5
II. If the Court Accepts Review, the Court Cannot Reach the Issue that Petitioner Wants to Reach Because the Decision is Supportable on Other Grounds	8
A. The TIF is a Tax under Federal Law	10
B. The TIF is a Tax under State Law	11
C. The TIF Was Not Imposed as a Condition of Approval	12
D. The Tax Issue Would Prevent the Court from Reaching the Issue that Petitioner Seeks to Have Heard	13
III. The Cases Do Not Present a Significant Conflict	13
IV. Cases Cited by Petitioner Can Readily Be Distinguished	15
V. The Issue Whether State Courts Are in Conflict Is Less Important When the Decision Is Not by the Highest Court in the State	17

TABLE OF CONTENTS – Continued

Page

VI. This Case Has Little Value as Precedent. The TIF Differs from Other Development Charges Because It Was Adopted as Tax by a Vote of the People 19

CONCLUSION 20

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

A. Magnano Co. v. Hamilton, 292 U.S. 40 (1934).....10

Benchmark Land Co. v. City of Battle Ground, 14 P.3d 172 (Wash. 2000), *aff'd*, 49 P.3d 8609 (Wash. 2002).....16

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999).....7, 18

City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369 (1974).....10

Clark v. City of Albany, 137 Or. App. 293, 904 P.2d 185 (1995), *review denied*, 322 Or. 644 (1996)..... 6

Commercial Builders of Northern California v. City of Sacramento, 941 F.2d 872 (9th Cir. 1991), *cert. denied*, 504 U.S. 931 (1992).....18

Dane v. Jackson, 256 U.S. 589 (1921)..... 8

Dolan v. City of Tigard, 512 U.S. 374 (1994).....*passim*

Ehrlich v. City of Culver City, 12 Cal.4th 854, 50 Cal. Rptr. 2d 242, 911 P.2d 429, *cert. denied*, 519 U.S. 929 (1996).....6, 7, 14

Henderson Bridge v. City of Henderson, 173 U.S. 592 (1899)..... 8

Home Builders Association of Central Arizona v. City of Scottsdale, 187 Ariz. 479, 930 P.2d 993, *cert. denied*, 521 U.S. 1120 (1997).....14, 18

Home Builders Association of Dayton v. City of Beavercreek, 729 N.E.2d 349 (Ohio 2000).....15

Houck v. Little River Drainage Dist., 239 U.S. 254 (1915).....8, 10

TABLE OF AUTHORITIES – Continued

Page

Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) 8

Krupp v. Breckenridge Sanitation District, 19 P.3d 687 (Colo. 2002) 14

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 6

Manocherian v. Lenox Hill Hospital, 643 N.E.2d 479 (NY 1994) 16

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) 5, 7, 16

Northern Illinois Homebuilders Ass'n v. County of Du Page, 649 N.E.2d 384 (Ill. 1995) 17

Oregon State Homebuilders v. City of Tigard, 43 Or. App. 791, 604 P.2d 886 (1979) 12

Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978) 8

Portland General Electric v. Bureau of Labor and Industries, 317 Or. 606 (1993) 11

San Remo Hotel v. City and County of San Francisco, 27 Cal.4th 643, 117 Cal. Rptr. 2d 269, 41 P.3d 87 (2002) 7, 14

Town of Flower Mound v. Stafford Estates Limited Partnership, 71 S.W.3d 18 (Tex. App. – Fort Worth 2002) 14

Trimen Development Co. v. King County, 877 P.2d 187 (Wash. 1994) 16

United States v. Sperry Corp., 493 U.S. 52 (1989) 9

Waters v. Montgomery County, 337 Md. 15, 650 A.2d 712 (1994) 14

TABLE OF AUTHORITIES – Continued

Page

STATUTES, RULES AND OTHER AUTHORITIES

Supreme Court Rule 10 ..... 17, 18
OR. CONST. Art. XI, Section 11b(2)(b) and (d) 12
Washington County, Or., Charter Section 20(a) 11
Washington County, Or. Code ("W.C.C.") § 3.17.020A 1
W.C.C. § 3.17.020B 1, 11
W.C.C. § 3.17.040A 1
W.C.C. § 3.17.060A 10, 13
W.C.C. § 3.17.090 ..... 2, 10
W.C.C. § 3.17.100 ..... 2, 10
W.C.C. § 3.17.140 11
Washington County, Or. Ordinance 379 § 2B 10

OPINIONS BELOW

In addition to the documents referenced in the petition, Washington County Ordinance 379, the ordinance adopting the Traffic Impact Fee, together with Appendix A to that ordinance, are reproduced as an Appendix to this brief.[1]

COUNTER-STATEMENT OF THE CASE

Washington County, Oregon, is a growing suburban and rural county lying west of Portland, Oregon; the City of Tigard lies entirely within the county. In 1986, and again in 1990, the County Board of Commissioners, in accordance with County Charter provisions for taxes, referred to the voters the "Traffic Impact Fee", or "TIF". Ordinance 379 and the 1990 ballot measure approved by the voters referred to TIF as a tax. The purpose of TIF is to "ensure that new development contributes to extra capacity transportation improvements needed to accommodate additional traffic generated by such development". The TIF "tax shall provide funds for extra capacity improvements to county and city arterials". Washington County, Or. Code ("W.C.C.") § 3.17.020A & B (1997) Pet. App. F at 47. The tax is imposed on all land development within Washington County, including cities, W.C.C. § 3.17.040A, Pet. App. F at 51, subject to limited exceptions.

[1] Petitioner included the codified TIF ordinance and Appendix A to that ordinance as Appendix F to its petition. The portion of the TIF ordinance at Pet. App. F at 72-77 is reproduced in its original format for greater clarity, in the Appendix to this brief, App. at 5-8.

TIF revenue must be placed in a dedicated fund, and spent only for capacity-increasing transportation projects. W.C.C. § 3.17.090, 3.17.100, Pet. App. F at 62-63.

In September 1996, the City of Tigard granted development approval to Rogers Machinery to build a new light industrial building of over 30,000 square feet. The following February, the City assessed the tax for the new building.

Rogers appealed the TIF assessment to the County hearings officer, contending that the "light industrial" land use category was incorrect, that TIF did not comply with state statutes, and that the assessment violated constitutional tests under *Dolan v. City of Tigard*, 512 U.S. 374 (1994). At the hearing, Rogers testified that it planned to hire no new employees, and therefore would generate no new trips.[2] The parties presented legal argument on the

---

[2] Petitioner asserts that "it is undisputed that its development will generate no new trips." This statement is incorrect. In fact, the County contested Rogers' argument on this point before the hearings officer below, because it was based solely on testimony as to intent, and therefore was not an objective basis for trip determination. The County hearings officer stated that TIF "can be imposed when the proposed use, such as in the instant case, will generate no new trips." Pet. App. A at 45. This statement was part of the opinion that analyzed and rejected Rogers' argument that its statement of intent should be substituted for mandatory provisions of the ordinance. It would be incorrect to view the phrase "no new trips" as an ordinary factual finding of the hearings officer, because it was not a fact to be determined in that hearing. The only factual issues in determining the amount of the tax are the type of use and facts relating to the basis for trip determination. In the case of Rogers Machinery's building, the basis for trip determination is total gross square feet of additional space, so the only relevant issue is the size of the building, not the number of employees.

state statutory issues, whether TIF was a tax or fee, and whether *Dolan* applied to TIF. The hearings officer upheld the TIF assessment, allocated by component land uses,[3] holding that it was a tax not subject to *Dolan*. Rogers filed a writ of review in Washington County Circuit Court. That court sustained the hearings officer's holding that TIF is a tax, and as such was not subject to *Dolan*. Rogers appealed to the Oregon Court of Appeals, and the parties renewed their statutory and constitutional arguments. The court upheld the TIF, but declined to decide whether it was a fee or a tax. The Court of Appeals held that *Dolan*'s heightened scrutiny did not apply to a fee or tax that was legislatively imposed and calculated, applied generally to all development, and was subject to no meaningful discretion in imposition or calculation. 181 Or. at 400. Rogers' petition for review to the Oregon Supreme Court was denied. Pet. App. B. Rogers then filed its petition for certiorari with this Court.

SUMMARY OF ARGUMENT

Washington County and the City of Tigard request that the Petition for Writ of Certiorari be denied. The

[3] The amount due is the product of the pre-set trip rate and charge per trip for the land use category, multiplied by the square footage of Rogers' new building. The city's original TIF assessment, based on the light industrial category, applied a single trip rate per thousand square feet to the entire building. When Rogers Machinery provided information that different portions of the building were to be put to different uses, the City recalculated the amount of the TIF according to the different uses, and the hearings officer set the amount of the TIF to be paid based on the recalculation.

decision of the Oregon Court of Appeals below is correct and consistent with the decisions of this court and is not inconsistent with the decision in *Dolan v. City of Tigard*, 512 U.S. 374 (1994). The Oregon Court of Appeals correctly held, consistent with other jurisdictions from around the country, that a purely monetary charge imposed through a broad, legislatively adopted framework should be analyzed differently than a requirement to dedicate an interest in real property.

Even if the court were to grant *certiorari*, it would not reach the issue that petitioner seeks to have reviewed. This case involves the Washington County Transportation Impact Fee (TIF), a validly adopted tax, and it is undisputed that taxes are not takings. *Dolan* does not apply to taxes, only to takings.

Although petitioners claim there is a conflict among the courts, there is no real conflict. In all Takings Clause cases involving a broad legislatively imposed fee or tax that did not leave significant discretion as to application or amount, the courts have upheld the fee. Although the rationale for the cases may be different, the results have been the same. There is no real conflict.

The opinion below was issued by the Oregon Court of Appeals, which is not the appellate court of last resort in this state. Therefore, to the extent that a conflict is claimed, the conflict is less worrisome because the conflict is not among appellate courts of last resort. The decision is not inconsistent with Supreme Court decisions.

This case would provide little precedent because the ordinance at issue was adopted as a tax measure, unlike most development charges or impact fees. Because the TIF differs in that important respect, a decision regarding the

TIF would have little value as precedent for non-tax development charges.

REASONS FOR DENYING REVIEW

I. The Oregon Court of Appeals' Decision Was Correct and Consistent with this Court's Takings Cases.

The Oregon Court of Appeals closely followed this Court's takings jurisprudence as applied to a purely monetary charge imposed through a broad, legislatively adopted framework. It reviewed this Court's holdings in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan*. In both cases, the government sought to acquire an interest in real property as a condition of granting development approval for a single parcel. The Oregon Court of Appeals concluded that the critical concern underlying *Nollan* and *Dolan* was the unfairness of singling out a property owner seeking development approval for imposition of unique, adjudicated conditions requiring real property dedications. In the court's view, those elements had made it possible for a local government to make improper use of its legitimate regulatory authority by leveraging a specific interest in property. It quoted this Court's explanation of why the facts of *Dolan* led it to depart from the more deferential approach to land use regulation:

> [traditional land use regulations] involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. Second, the conditions imposed were not

> simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city.
> 181 Or. App. at 387 (citing *Dolan*, 512 U.S. at 385).

The court performed a detailed review of the TIF ordinance. It found the charge to be mandatory on all development in the county, set by a detailed, pre-established legislative framework, and that no significant discretion was involved in its imposition or calculation. *Id.* at 395, 397. Based on this, the court concluded that the factual predicate for *Dolan* – an adjudicative decision applicable to one parcel and a requirement to dedicate real property – was not present in *Rogers*. *Id.* at 387. It reasoned that the *Dolan* departure from a traditional standard of review was not warranted. TIF imposed a requirement to pay money, not an obligation to convey an interest in real property. Further, the special protection afforded to physical occupation of real property would not apply to a requirement to pay money. *Id.* at 382 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)). The court distinguished its earlier holding in *Clark v. City of Albany*, 137 Or. App. 293, 904 P.2d 185 (1995), *review denied*, 322 Or. 644 (1996). In *Clark*, the Oregon Court of Appeals had applied the *Dolan* tests to a requirement to pay for road improvements where no dedication of real property was required. The condition required in that case, however, was "an ad hoc adjudicatory imposition of a monetary exaction, not a generally applicable and legislatively imposed development fee". 181 Or. App. at 395.

The court undertook a detailed review of two post-*Dolan* California Supreme Court cases, *Ehrlich v. City of*

Culver City, 12 Cal. 4th 854, 50 Cal. Rptr. 2d 242, 911 P.2d 429, *cert. denied,* 519 U.S. 929 (1996); and *San Remo Hotel v. City and County of San Francisco*, 27 Cal. 4th 643, 117 Cal. Rptr. 2d 269, 41 P.3d 87 (2002). Both *Ehrlich* and *San Remo* involved development impact fees challenged as violations of the Takings Clause. In *Ehrlich*, two very different fees were at issue. A generally applied requirement to provide or pay for art in public places was upheld, 50 Cal. Rptr. 2d at 263, and the California court held it was not the kind of development action subject to the *Nollan/Dolan* analysis. The recreation fee, though a purely monetary charge, was subject to heightened scrutiny because it was imposed "neither generally nor ministerially, but on an individual and nondiscretionary basis." *Id.* at 257. In *San Remo*, the California Supreme Court followed the basic distinction set out in *Ehrlich*, holding that a monetary exaction would not be subject to *Dolan* because it was legislatively adopted, applied to all property within its class, and was nondiscretionary in imposition and calculation. The Oregon Court of Appeals in *Rogers* expressly adopted the analysis of the California Supreme Court in *Ehrlich* and *San Remo*. 181 Or. App. at 397.

This Court has expressly cautioned that the application of *Dolan* is to be limited: "[W]e have not extended the rough proportionality test of *Dolan* beyond the special context of exactions – land-use decisions conditioning approval of development on the dedication of property to public use." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999). The Oregon Court of Appeals in Rogers correctly followed this direction and refused to extend the application of *Dolan* beyond that set out by this Court.

II. If the Court Accepts Review, the Court Cannot Reach the Issue that Petitioner Wants to Reach Because the Decision is Supportable on Other Grounds.

While the Oregon Court of Appeals correctly held that a generally applicable requirement to pay "imposed on a broad range of specific, legislatively determined subcategories of property through a scheme that leaves no meaningful discretion either in the imposition or in the calculation of the fee" is not subject to the *Dolan* standards, 181 Or. App. at 400, it erred by even considering the question. The Oregon Court of Appeals acknowledged that the Takings Clause does not apply to taxes. 181 Or. App. at 379. This holding is consistent with a long line of cases from this court that taxes are not takings. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (the taxing power is an "obvious example" of a governmental power that does not give rise to takings claims); *Dane v. Jackson*, 256 U.S. 589, 598-99 (1921); *Houck v. Little River Drainage Dist.*, 239 U.S. 254, 264 (1915); *Henderson Bridge v. City of Henderson*, 173 U.S. 592, 614-15 (1899); *see Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491 n.21 (1987) ("Not every individual gets a full dollar return in benefits for the taxes he or she pays; yet, no one suggests that an individual has a right to compensation for the difference between the taxes paid and the dollar value of the benefit received.")

The Oregon Court of Appeals attempted to sidestep the question of whether the TIF is a tax. The court stated that the TIF "has a hybrid quality," incorporating aspects of both a tax and a fee or special assessment. 181 Or. App. at 381. It reached no conclusion as to whether a "hybrid" would be considered a tax for purposes of the Takings

Clause. It simply argued that characterization of the TIF as a tax would not address petitioner's challenge.

The Court of Appeals was wrong. If the TIF is a tax, which it is, petitioner's challenge is fairly and fully met and the only possible conclusion is that *Dolan* does not and cannot apply. If the petitioner had challenged the income tax as a taking, the classification of the income tax as a tax would have met petitioner's challenge squarely and would have determined the outcome of the case. The rules are no different here just because the tax in this case is imposed at the time of building permit issuance. If the TIF is a tax, it is not a taking, and *Dolan* does not apply.

The Court of Appeals did not conclude that the TIF is not a tax. As discussed in more detail below, it is a tax and the TIF is not subject to *Dolan* because as a tax it is not a taking.[4]

---

[4] Even if the TIF were not a tax, it would have to be considered a fee. Fees are subject to the rules set forth in *United States v. Sperry Corp.*, 493 U.S. 52 (1989), not the rules set out in *Dolan*. Petitioner has not argued that the fee violates any of the principles set out in *Sperry*. Indeed, in that case the Court held that the *availability* of the government service is sufficient to justify a fee, 493 U.S. at 63-64, and here the availability of the City's expanded transportation system, which Rogers Machinery in fact uses to access its property, is sufficient to justify the TIF, regardless of the petitioner's plans as to whether to hire additional employees. TIF proceeds are used for capacity-increasing transportation improvements. These facilities are planned to provide sufficient capacity to handle traffic based on the ability of existing and foreseeable development to generate traffic. An additional 30,000 square foot building creates the opportunity for more employees and more production, and therefore more trips, even if there are no immediate plans to add employees. Basing the TIF on the square footage results in less governmental intrusion into business by making the imposition of the TIF a relatively rare event (only when floor space is increased or there

(Continued on following page)

A. The TIF is a Tax under Federal Law.

This Court has defined "tax" as "an enforced contribution for the payment of public expenses." *Houck v. Little River Drainage Dist.*, 239 U.S. at 265; *accord, A. Magnano Co. v. Hamilton*, 292 U.S. 40 (1934). The TIF is an enforced contribution – payment is required at the time of issuance of a building permit. W.C.C. § 3.17.060A, Pet. App. F at 54. It is used to pay public expenses, specifically the cost of transportation facilities. W.C.C. § 3.17.090, 3.17.100, Pet. App. F at 62-63.

In *City of Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369, 375 (1974), the Court held that a requirement to pay is a tax so long as it results in any revenue for the government, even if the revenue is insubstantial or if the revenue purpose is only secondary. The TIF does result in revenue for the government, and the revenue purpose is primary. The Washington County Board of Commissioners, which approved the TIF as a pre-requisite to voter approval, found that the TIF was "an appropriate and necessary exercise of the taxing power of the Board of County Commissioners." Ordinance 379 § 2B, App. at 2.

There is another reason to consider the TIF a tax. Washington County is a jurisdiction with specific rules as to how taxes are to be adopted. Those rules differ from the rules for adopting fees or imposing special assessments. In Washington County, taxes approved by the County Board

---

is a change to a more intensive use), whereas a scheme based on numbers of employees would result in a constant intrusion of the government to determine whether the numbers of employees had increased.

of Commissioners must also be approved by the voters of the County. Washington County, Or., Charter Section 20(a). The TIF was adopted by the Board of Commissioners and approved by the voters as a tax. *See* Pet. App. D at 40. If a special procedure is required for adoption of a tax and that procedure is followed, what results is a tax.

B. The TIF is a Tax under State Law.[5]

Under Oregon law, the goal in interpreting a statute or ordinance is to determine the intent of the adopting body, relying solely on the text and context of the ordinance if the intent can be determined from the text and context. *Portland General Electric v. Bureau of Labor and Indus.*, 317 Or. 606, 610-11 (1993). The intent of the Board of Commissioners and the voters is clear from the text of the TIF ordinance. A stated purpose of the TIF is that "[t]his tax shall provide funds." W.C.C. § 3.17.020B, Pet. App. F at 47. The ordinance requires annual review "to determine whether additional tax revenues should be generated." W.C.C. § 3.17.140, Pet. App. F at 67. The Board and voters clearly intended the TIF to be a tax. Under Oregon law, that makes it a tax.

The Court of Appeals' decision is not to the contrary. The Court of Appeals did not hold that the TIF was not a tax. It held that it had a "hybrid quality" incorporating

---

[5] The County and the City do not accept that state law affects the determination whether the TIF is a tax for purposes of a claim that the TIF is a taking under the United States Constitution. Whether the TIF is a tax for purposes of the Takings Clause is determined by federal precedent, but this section is included to address arguments by petitioner that state law determines whether the TIF is a tax.

aspects of a tax and aspects of a special assessment and avoided the question whether it was a tax. Under Oregon law, if a requirement to pay does not fully comply with the requirements for an assessment for local improvements, it is a tax. *See e.g.*, OR. CONST. Art. XI, Section 11b(2)(b) and (d).[6] The TIF is a tax under Oregon law because it does not fully comply with the requirements of a special assessment.

The Circuit Court held that the TIF is a tax. Pet. App. D at 40. The Court of Appeals in classifying the TIF was primarily concerned with whether the systems development charge statutes applied and paid far less attention to whether the TIF was a tax. The Court of Appeals concluded that the TIF is subject to the SDC statutes but did not decide whether the TIF is a tax. However, under the Court of Appeals' previous decision in *Oregon State Homebuilders v. City of Tigard*, 43 Or. App. 791, 798, 604 P.2d 886 (1979), a local government may properly treat an SDC as a tax. Here, the City and County treat the TIF as a tax, so it is properly considered a tax under state law as the Circuit Court correctly held.

C. The TIF Was Not Imposed as a Condition of Approval.

Dolan involved conditions of approval in a land use decision. Here, petitioner received a land use approval for

---

[6] The TIF is not subject to Article XI, Section 11b of the Oregon Constitution because, although it is a tax, it is not imposed on property.

the expansion of the building,[7] and the approval did not contain a condition requiring payment of the TIF. The requirement to pay the TIF at the time of building permit issuance is found in the Washington County Code. W.C.C. § 3.17.060A, Pet. App. F at 54. This is not a case of an exaction imposed as a condition of approval, it is a case involving a tax that is payable at the time of building permit issuance.

D. The Tax Issue Would Prevent the Court from Reaching the Issue that Petitioner Seeks to Have Heard.

The TIF is a tax and as such is not a taking. A *Dolan* analysis is triggered only if a court first finds that the challenged action would constitute a taking outside the context of a land use approval. *Dolan v. City of Tigard*, 512 U.S. at 385. Before the Court could ever reach the issue that petitioner seeks to have it address, it would have to decide the issue whether the TIF is a tax. Because the TIF is a tax, that issue would be determinative and the issue that the petitioners seek to have considered could not be addressed.

III. The Cases Do Not Present a Significant Conflict.

With one exception, the lower courts addressing the kind of charge imposed in *Rogers* have developed a common

[7] An expansion that resulted in the addition of more than 30,000 square feet of building space and approximately 100 additional parking spaces.

approach to constitutional analysis. Where a local government monetary charge is based upon a pre-established legislative framework, imposed on a broad class of property owners, and subject to minimal discretion in imposition or calculation, *Dolan* does not apply. Only where one of the above factors is not present may heightened scrutiny apply. Stated another way, the lower courts are in general agreement that *Dolan* should be applied to a monetary exaction only where the charge has been imposed pursuant to a discretionary, individual adjudication. It is important to note that most of the cases are state court decisions, often including various unique state case law and statutory issues.

The leading cases are *Ehrlich* and *San Remo*, due to their detailed analysis of the issues. Other impact fee decisions support the same analytical approach. *Home Builders Association of Central Arizona v. City of Scottsdale*, 187 Ariz. 479, 930 P.2d 993 (water development fee not subject to *Dolan* because no individual adjudication; *Ehrlich* cited with approval), *cert. denied,* 521 U.S. 1120 (1997); *Krupp v. Breckenridge Sanitation District*, 19 P.3d 687 (Colo. 2002) (generally applied sewer fee not subject to *Nollan/Dolan* takings analysis); *Waters v. Montgomery County*, 337 Md. 15, 650 A.2d 712 (1994) (*Dolan* inapplicable to "development impact tax"); *Town of Flower Mound v. Stafford Estates Limited Partnership*, 71 S.W.3d 18 (Tex. App. – Fort Worth 2002) (*Dolan* test applies to road improvement condition resulting from an adjudicative decision.).

IV. Cases Cited by Petitioner Can Readily be Distinguished.

As the Oregon Court of Appeals noted in *Rogers*, there are divisions among state courts as to how far to extend *Dolan* beyond its base in real property exactions. 181 Or. App. at 388-389. But there is near consensus among state courts as to proper analysis of non-discretionary, legislatively adopted fee exactions following *Dolan*. Most of the cases cited by Petitioner can readily be distinguished, and do not indicate that there is a conflict among the lower courts that this Court must resolve.

In *Home Builders Association of Dayton v. City of Beavercreek*, 729 N.E. 2d 349 (Ohio 2000), the Ohio Supreme Court announced that it was applying *Dolan* to a transportation impact fee, but did not actually do so. In plaintiff's challenge and the court's ruling applied to the ordinance generally, not to the facts of any particular development. It was therefore not possible to fully apply *Dolan*, which was framed to test an individual exaction. The court found that the "essential nexus" element of *Dolan* was satisfied because the City of Beavercreek fee methodology showed a reasonable relationship between the need for new roadways and the traffic generated by new development. *Homebuilders Association of Dayton*, 729 N.E. 2d at 357. It then incorrectly stated the second prong of *Dolan* to be the relationship between the "fee imposed on a developer and the *benefits accruing to the developer*", *id.* (emphasis added), rather than the impact of the development. *See Dolan*, 512 U.S. at 388. For these reasons, *Homebuilders Association of Dayton* is not an appropriate example of *Dolan*'s application to a development fee exaction.

Petitioner cites *Benchmark Land Co. v. City of Battle Ground*, 14 P.3d 172 (Wash. 2000), *aff'd*, 49 P.3d 8609 (Wash. 2002) as a case applying the *Dolan* tests to a monetary exaction. While the Washington Court of Appeals applied a *Nollan/Dolan* test to a City's requirement to improve an adjoining street, the state's Supreme Court based its holding on the city's failure to meet a state statute in imposing the condition and did not reach the constitutional issue. 49 P.3d at 865. The Oregon Court of Appeals also noted that it was not clear whether or not *Benchmark* involved an adjudicatory action. *Rogers*, 181 Or. App. at 392 n.12.

Trimen Development Co. v. King County, 877 P.2d 187 (Wash. 1994) also is cited by Petitioner as a case in which *Dolan* was applied to a legislatively adopted impact fee. In that case, the Washington Supreme Court upheld a requirement to dedicate park land or pay a fee in lieu of dedication, as a condition of development. Plaintiff in that case challenged the fee under state statutes applicable to development exactions, and the court's holding is based on application of those statutes. 877 P.2d at 194-195. The case was decided less than one month after *Dolan*. The opinion simply cited *Dolan*, apparently implying that compliance with the state statute at issue was similar to finding rough proportionality between a required dedication and impact of a development. *Id.* at 194. The court in *Trimen* undertook no analysis of the Takings Clause as applied to fees in its opinion.

In *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479 (N.Y. 1994), the local government had required a property owner to provide a leasehold interest in real property to another private entity. Therefore it is of limited value as to the question of impact fees charged for

public facilities. *Northern Illinois Homebuilders Ass'n v. County of Du Page*, 649 N.E.2d 384 (Ill. 1995) is also of limited value as constitutional guidance. The Illinois Supreme Court applied a "specific and uniquely attributable" test based on its prior state precedent, acknowledging that it was more strict than *Dolan* would require. 649 N.E.2d at 389.

Most of the variations in the standard of review applied in the cases cited above arise from differences in the nature of the exaction when compared to the kind of charge upheld in *Rogers*. In the other cases, the lower court either did not reach the constitutional issue, or applied a standard unique to the law of its state.

V. The Issue Whether State Courts Are in Conflict Is Less Important When the Decision Is Not by the Highest Court in the State.

The decision below was by the Oregon Court of Appeals, the first level appeal court in Oregon. The Oregon Supreme Court denied review and refused to hear the case.

Supreme Court Rule 10(b) provides that a reason to grant a petition for certiorari is that a state court of last resort has decided a federal question in a way that conflicts with a decision of another state court of last resort or of a United States court of appeals. Supreme Court Rule 10(c) provides that a reason to grant a petition for certiorari is that any court has decided an important federal question in a way that conflicts with relevant decisions of this Court.

While the list of considerations in Rule 10 is not exclusive, the list does demonstrate that decisions by state courts that are not the court of last resort in the state are less important in considering whether there are conflicts between courts.

There are good reasons for this position. First, a state intermediate appellate decision is less likely to be considered outside its jurisdiction. Second, the intermediate appellate position can later be overturned by the state court of last resort.

Rule 10(c) does not apply. That rule provides a reason for review only if the state court decision conflicts with a relevant decision of the Supreme Court. The decision in this case, like the decisions in other impact fee and development charge cases in which the Court has denied review,[8] does not conflict with *Dolan*, because *Dolan* applied only to exactions of real property as a condition of development approval, *City of Monterey v. Del Monte Dunes of Monterey, Ltd.*, 526 U.S. 687, 702-03 (1999), and does not extend to legislatively adopted development charges, whether imposed as taxes or otherwise.

---

[8] Those cases include *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872, 875-76 (9th Cir. 1991), *cert. denied*, 504 U.S. 931 (1992); *Home Builders Association of Central Arizona v. City of Scottsdale*, 187 Ariz. 479, 930 P.2d 993, *cert. denied*, 521 U.S. 1120 (1997).

VI. This Case Has Little Value as Precedent. The TIF Differs from Other Development Charges Because It Was Adopted as Tax by a Vote of the People.

The TIF was adopted as a tax, following all the formalities applicable to the adoption of a tax, including an ordinance by the County Board of Commissioners and approval by the voters. Few, if any, other development charges have been adopted as a tax. A decision in this case would have little value as precedent because it would apply only to those cases involving a tax imposed at the time of development. It would have no value as precedent in a case involving a development charge that has not been adopted as a tax and would provide no precedent for *ad hoc* requirements to pay.

CONCLUSION

The petition for writ of certiorari should be denied for the reasons stated above.

Respectfully submitted,

DAN R. OLSEN *
LORETTA S. SKURDAHL
WASHINGTON COUNTY COUNSEL
155 N. First Avenue
Suite 340
Hillsboro, Oregon 97124
(503) 846-8747
Attorneys for Washington County

TIMOTHY V. RAMIS
GARY FIRESTONE
RAMIS, CREW, CORRIGAN & BACHRACH, LLP
1727 NW Hoyt Street
Portland, Oregon 97209
(503) 222-4402
Attorneys for City of Tigard

* *Counsel of Record*

APPENDIX

"A" Engrossed

IN THE BOARD OF COUNTY COMMISSIONERS

FOR WASHINGTON COUNTY, OREGON

Ordinance No. 379 (An Ordinance Adopting a Countywide Traffic Impact Tax on New Development, Providing Certain Exceptions and Credits, Establishing Administrative Procedures, Repealing the Existing TIF and Referring This Ordinance To the Voters.

(Filed Aug. 10, 1990)

SECTION 1.

The Board of County Commissioners of Washington County, Oregon, ordains:

A. The Traffic Impact Fee ordinance first adopted in 1986, as subsequently amended, has been an efficient, effective and equitable program to address a portion of the extra-capacity road needs generated by new development.

B. Extending the tax countywide will promote cooperation between the applicable jurisdictions, enhance economic development, encourage uniform application of laws relating to new development, provide additional revenues to meet a portion of extra-capacity needs and, in general, represents a wholistic approach to the issue of accommodating development while preserving the health and welfare of the citizens of Washington County.

C. Certain changes to the prior TIF program are necessary for proper countywide application and to

respond to the needs and concerns of the cities within Washington County. The Board recognizes that it is necessary to negotiate intergovernmental agreements with cities to address administrative issues important to implementation of this Ordinance.

SECTION 2.

A. The Board adopts the report entitled "Countywide Traffic Impact Fee Needs Policies" in support of this Ordinance and notes that the tax imposed by this ordinance does not meet all of the identified needs for extra-capacity improvements but must be viewed as one component of a multi-faceted program.

B. The Board has heard testimony from staff, interested jurisdictions, groups and individuals, has been fully apprised of the issues and finds that this is an appropriate and necessary exercise of the taxing power of the Board of County Commissioners.

SECTION 3.

A. Exhibit "A" attached and by this reference hereby is adopted as the traffic impact fee ordinance imposing a countywide tax as provided for therein.

B. Pursuant to Charter Section 10(a), this ordinance shall be referred to the voters at the special election set for September 18, 1990 and, if approved, pursuant to Charter Section 50(c) shall take effect 30 days from such approval.

C. The Office of County Counsel is authorized to [certify] *codify* this ordinance, and is hereby authorized to

make any technical changes, not affecting the substance of this ordinance, as necessary to accomplish such codification.

D. A determination by a court of competent jurisdiction that any section, clause, phrase, or word of this Ordinance, or its application, is invalid or unenforceable for any reason shall not affect the validity of the remainder of the Ordinance or its application and all portions not so stricken shall continue in full force and effect.

SECTION 4.

A. Upon the effective date of this Ordinance, Washington County Code Chapter 3.17, originally adopted as Ordinance Nos. 310, 319 and 328, is repealed except for the limited applicability provided in Exhibit "A" for previous developments or developments in process.

B. All TIF funds received pursuant to said repealed ordinances may be expended as provided therein. Adoption of this ordinance shall in no way impact the validity of credits, offsets, public improvement contracts, appropriations, budgets or other such actions taken or decisions made in accordance with the former TIF ordinance.

ENACTED this 14th day of August, 1990, being the 4th reading and 2nd public hearing before the Board of County Commissioners of Washington County, Oregon.

BOARD OF COUNTY COMMISSIONERS FOR WASHINGTON COUNTY, OREGON

APPROVED

/s/ Roy R. Rogers
Chairman
/s/ Pam Rychart
Recording Secretary

	READING	PUBLIC HEARING
FIRST	July 24, 1990	August 7, 1990
SECOND	July 30, 1990	August 14, 1990
THIRD	August 7, 1990	
FOURTH	August 14, 1990	
FIFTH	_____	

VOTE: Aye Meek, Larrance, Rogers
Nay None
Absent Hays, Killpack
Abstain None

Recording Secretary: /s/ Pam Rychart Date: 8/14/90

APPENDIX A

LAND USE CATEGORY/DESCRIPTION	BASIS FOR TRIP DETERMINATION	WEEKDAY AVERAGE TRIP RATE	WEEKEND AVERAGE TRIP RATE
Residential			
210 – Single-Family Detached Housing	Number of Units	10.0	
220 – Apartment	" " "	6.10	
221 – Low-Rise Apartment	" " "	6.60	
222 – High-Rise Apartment	" " "	4.20	
230 – Residential Condominium	" " "	5.85	
231 – Low-Rise Condominium	Not Available	*	
232 – High-Rise Condominium	Number of Units	4.18	
240 – Mobile Home	" " "	4.81	
250 – Retirement Community	" " "	3.30	
260 – Recreational Home	" " "	3.16	
270 – Planned Unit Development (Residential)	" " "	7.44	
Institutional			
010 – Watersports	Ship Berths	100.00[3]	*
020 – Airport	Not Available	*	*
021 – Commercial Airport	Avg. Flights/Day	11.83	*
022 – General Aviation Airport	" " "	3.06	*
030 – Truck Terminals	T.G.S.F.	9.86	
040 – Railroad Terminal	Not Available	*	*
410 – Park	Parking Spaces	7.58	11.82
411 – City Park	Acres	3.66	33.58
412 – County Park	Acres	2.11	2.26
413 – State Park	Acres	1.05	1.78
420 – Marina	Boat Berths	3.00	5.55
430 – Golf Course	Parking Spaces	6.62	5.95
440 – Theater	Not Available	*	*
441 – Live Theater	" "	*	*
442 – Music Theater	" "	*	*
443 – Movie Theater (sit down)	Parking Spaces	6.19[1]	7.18[1]
444 – Drive-In Theater	Not Available	*	*
450 – Stadium	Parking Spaces	0.55	*
451 – Baseball/Football	Not Available	*	*
452 – Horse Race	Parking Spaces	1.08	*
453 – Auto Race	Not Available	*	*
454 – Dog Race	" "	*	*
460 – Camp	" "	*	*
491 – Tennis Courts	T.G.S.F.	32.93	23.80
492 – Racquet Clubs	"	15.94	23.85
501 – Military Base	Number of Employees	1.78	*
510 – Preschool	Not Available	*	*
520 – Elementary School	Number of Students	1.03	*
530 – High School	" " "	1.39	*
540 – Junior/Community College	" " "	1.55	*
550 – University	Number of Students	2.41	*
560 – Church	T.G.S.F.	7.70	18.18

LAND USE CATEGORY/DESCRIPTION	BASIS FOR TRIP DETERMINATION	WEEKDAY AVERAGE TRIP RATE	WEEKEND AVERAGE TRIP RATE
565 – Day Care Center	"	67.00	6.15
570 – Court	Not Available	*	*
571 – Prison[4]	" "	*	*
580 – Museum/Gallery	" "	*	*
590 – Library	T.G.S.F.	45.50	25.39
610 – Hospital	T.G.S.F.	16.69	11.29
620 – Nursing Home	Number of Beds	2.60	2.26
Business and Commercial			
310 – Hotel	Number of Rooms	8.70	
320 – Motel	" " "	10.19	
330 – Resort Hotel	" " "	18.40	
810 – Retail-General Merchandise	Not Available	*	
811 – Specialty Store	" "	*	
812 – Building Materials/Lumber	T.G.S.F.	30.56	
813 – Lumber	Not Available	*	
814 – Specialty Retail Center	T.G.L.S.F.	40.68	
815 – Discount Stores	"	70.16	
816 – Hardware/Paint Store	T.G.S.F.	53.21	
817 – Nursery	"	36.17	
820 – Shopping Center under 50,000 Gr.Sq.Ft.	T.G.L.S.F.	94.71	
821 – Shopping Center 50,000 – 99,999 Gr.Sq.Ft.	T.G.L.S.F.	84.51[2]	
822 – Shopping Center 100,000 – 199,999 Gr.Sq.Ft.	"	66.62[2]	
823 – Shopping Center 200,000 – 299,999 Gr.Sq.Ft.	"	53.62[2]	
824 – Shopping Center 300,000 – 399,999 Gr.Sq.Ft.	"	45.66[2]	
825 – Shopping Center 400,000 – 499,999 Gr.Sq.Ft.	"	41.41[2]	
826 – Shopping Center 500,000 – 999,999 Gr.Sq.Ft.	"	36.63[2]	
827 – Shopping Center 1,000,000 – 1,200,000 Gr.Sq.Ft.	"	32.82[2]	
828 – Shopping Center Over 1,200,000 Gr.Sq.Ft.	"	32.38[2]	
831 – Quality Restaurant	T.G.S.F.	95.62[2]	
832 – High-Turnover, Sit-Down Restaurant	"	100.00[3]	
833 – Drive-In Restaurant	"	100.00[3]	
834 – Drinking Place	Not Available	*	
841 – New Car Sale	T.G.S.F.	47.52	
842 – Used Car Sale	Not Available	*	
843 – Auto Parts Sale	Not Available	*	
844 – Service Station	No. of Pumps	100.00[3]	
845 – Tire, Battery and Accessory	Not Available	*	

LAND USE CATEGORY/DESCRIPTION	BASIS FOR TRIP DETERMINATION	WEEKDAY AVERAGE TRIP RATE	WEEKEND AVERAGE TRIP RATE
846 – Car Wash	Not Available	*	
847 – Auto Repair	Not Available	*	
848 – Highway Oasis (including truck fuel, minimal trucker and mechanical services)	" "	*	
849 – Truck Stop (including food, auto and truck mechanical services, trucker supplies and trucker overnight sleeping accommodations)	Not Available	*	
850 – Supermarket	T.G.S.F.	100.00[3]	
851 – Convenience Market	" "	100.00[3]	
870 – Apparel	" "	3.33	
890 – Furniture Store	" "	4.35	
895 – Video Arcade	" "	9.60	
911 – Bank (walk-in)	" "	100.00[3]	
912 – Drive-In Bank	" "	100.00[3]	
913 – Savings and Loan (walk-in)	" "	61.00	
914 – Drive-In Savings and Loan	" "	100.00[3]	
Office			
630 – Clinic	T.G.S.F.	23.79	
711 – General Office, Under 100,000 Gross Square Feet (G.S.F.)	*	16.31	
712 – General Office, 100,000 – 199,000 G.S.F.	*	12.40	
713 – General Office, 200,000 G.S.F. and Over	*	11.54	
720 – Medical Office Building	*	34.17	
730 – Government Office Building	T.G.S.F.	68.93	
731 – State Motor Vehicles Department	*	16.60	
732 – U.S. Post Office	" "	86.78	
740 – Civic Center	" "	25.00	
750 – Office Park	USE General Office		
760 – Research Center	T.G.S.F.	6.09	
770 – Business Park	*	12.42	
910 – Financial	Not Available	*	
915 – Stockbroker	" "	*	
916 – Lending Agency	" "	*	
920 – Real Estate	" "	*	
930 – Insurance	T.G.S.F.	11.45	
Industrial			
110 – General Light Industrial	T.G.S.F.	6.97	
120 – General Heavy Industrial	"	1.50	
130 – Industrial Park	"	6.97	
140 – Manufacturing	"	3.85	
150 – Warehouse	"	4.88	
151 – Mini-Warehouse	"	2.61	
170 – Utilities	Employees	1.07	

LAND USE CATEGORY/DESCRIPTION	BASIS FOR TRIP DETERMINATION	WEEKDAY AVERAGE TRIP RATE	WEEKEND AVERAGE TRIP RATE
180 · · Agricultural	Not Available	*	
860 – Wholesale	T.G.S.F.	6.73	

NOTES

* Not Available – Indicates that the ITE manual does not contain information for this use. Therefore, the basis for trip determination shall be as set forth in Section 3.17.040(D).

[1] Without Matinees

[2] Note: Rate obtained by taking average of maximum and minimum rates of range

[3] Note: Rate capped at 100.00

[4] Note: Category may be used for permits submitted after January 15, 1996

TGSF – Thousand Gross Square Feet

TGLSF – Thousand Gross Leasable Square Feet

(5)

Supreme Court, U.S.
FILED
DEC 16 2002
OFFICE OF THE

No. 02-750

IN THE
SUPREME COURT OF THE UNITED STATES

ROGERS MACHINERY COMPANY, INC.,
Petitioner,

v.

CITY OF TIGARD, AND
WASHINGTON COUNTY,
Respondents.

On Petition for Writ of Certiorari to the Oregon Court of Appeals

BRIEF AMICUS CURIAE OF WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONER

Daniel J. Popeo
Paul D. Kamenar
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Date: December 16, 2002

17 pp

QUESTION PRESENTED

Whether the level of judicial scrutiny articulated by this Court in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), applies to legislatively determined monetary exactions imposed as conditions on the development of property, irrespective of the actual impacts the development may have in relation to the stated purpose of the exaction.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTERESTS OF AMICI CURIAE 1

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 5

THE COURT SHOULD RESOLVE THE CLEAR SPLIT IN THE LOWER COURTS AS TO WHETHER HEIGHTENED SCRUTINY OF *NOLLAN* AND *DOLAN* APPLIES TO MONETARY EXACTIONS THAT ARE LEGISLATIVELY IMPOSED 5

CONCLUSION 12

TABLE OF AUTHORITIES

Page

Cases:

Agencia La Esperanza Corp., Inc. v. Orange County Board of Supervisors, Sup. Ct. No. 02-638 . . . 11

Amoco Oil Co. v. Village of Schaumburg, 661 N.E.2d 380 (1995) 5

Dolan v. City of Tigard, 512 U.S. 374 (1994) . . *passim*

Ehrlich v. City of Culver City, 911 P.2d 429 (Cal. 1996) 4

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 7

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) . . . . . *passim*

Parking Ass'n of Georgia v. City of Atlanta, 450 S.E.2d 200 (1994) 5

Parking Ass'n of Georgia v. City of Atlanta, 515 U.S. 1116 (1995) 9

Phillips v. Washington Legal Foundation, 524 U.S. 156 (1998) 6

Rogers Machinery, Inc. v. Washington County, 45 P.3d 966 (Or. Ct. App. 2002) 4

Rogers Machinery, Inc. v. Washington County,
52 P.2d 1057 (Or. 2002) 4

United States v. General Motors Corp.,
323 U.S. 373 (1945) 8

Webb's Fabulous Pharmacies, Inc. v. Beckwith,
449 U.S. 155 (1980) 6

Constitution and Statutes:

U.S. Const., Amend. V (Takings Clause) . . . . *passim*

WCC, Section 3.17 . . . . . *passim*

Miscellaneous:

Douglas W. Kmiec, *Inserting The Last Remaining Pieces Into The Takings Puzzle*, 38 WM. & MARY L. REV. 995 (1997) 8

Inna Reznik, *The Distinction Between Legislative and Adjudicative Decision in* Dolan v. City of Tigard,
75 N.Y.U.L. REV. 242 (2000) 9

IN THE
SUPREME COURT OF THE UNITED STATES

No. 02-750

ROGERS MACHINERY COMPANY, INC.,
Petitioner,

v.

CITY OF TIGARD, AND
WASHINGTON COUNTY,
Respondents.

On Petition for Writ of Certiorari to the Oregon Court of Appeals

---

BRIEF AMICUS CURIAE OF WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTERESTS OF AMICUS CURIAE

The Washington Legal Foundation (WLF)[1] is a nonprofit public interest law and policy center based in Washington, D.C., with supporters across the nation.

---

[1] Pursuant to Supreme Court Rule 37.6, amicus curiae states that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than amicus and its counsel, contributed monetarily to the preparation and submission of this brief. All parties have consented to the filing of this brief and their letters of consent have been lodged with the Clerk of this Court.

WLF regularly appears in legal proceedings before federal and state courts to defend the principles of free enterprise, limited government, and the protection of private property rights. In particular, WLF has appeared as a party or *amicus curiae* before this and other courts in cases raising Fifth Amendment regulatory takings claims involving both real property and monetary exactions. *See, e.g.*, *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal. 1996); *San Remo Hotel, L.P. v. City and County of San Francisco*, 41 P.3d 87 (Cal. 2002).

WLF believes that the Takings Clause of the Fifth Amendment was meant to apply to the taking of all private property, regardless of how the property is "taken" by the government -- whether outright, or as a restriction or condition on the use of property, including the imposition of development exactions or so-called impact fees -- and regardless of whether the government's method of taking the property is accomplished at the "retail level" through an ad hoc adjudicatory process, or at the "wholesale level" by a general legislative scheme.

If left intact, the lower court's refusal to apply the Takings Clause would leave the government's growing use of monetary exactions without any meaningful standard of judicial review. Accordingly, amicus believes that it is imperative that the Court grant the Petition and clarify its takings jurisprudence for the benefit of property owners, government regulators, and lower courts alike.

STATEMENT OF THE CASE

In the interests of judicial economy, amicus adopts by reference the Statement of the Case as presented by the Petitioner. In brief, the corporate headquarters of Rogers Machinery Company, Inc. (Rogers or Petitioner) originally occupied one building. Because the quarters became cramped, Rogers proposed to construct a new adjacent building to relieve the overcrowding. No new employees were to be hired; rather, some 40 current employees would move from the old building into the new building. Pet. 2-3.

As a condition for obtaining a building permit, the City of Tigard required Rogers to pay it $37,102 as a traffic impact fee (TIF). That fee was arrived at by using a legislatively determined formula based upon the hypothetical additional automobile trips that the new development might generate, rather than the amount of trips actually generated. *See* Section 3.17 of the Washington County Code (WCC); Pet. App. 47a.

The avowed purpose of the ordinance, however, is not couched in such hypothetical terms. Rather, the "[p]urpose and scope" of the traffic impact fee is to "ensure that the *new* development contributes to extra capacity transportation improvements *needed* to accommodate additional traffic *generated* by such development." WCC § 3.17.020(A) (emphasis added). Pet. App. 47a. Despite the undisputed fact that the development in this case would not generate any new traffic, Rogers was not allowed to rebut the legislative presumption that it would. Petitioner was required to pay the TIF as a condition for obtaining a building permit to construct the new office building.

Petitioner made an "as applied' rather than a facial takings challenge to the ordinance. Before the Washington County Hearing Officer, Rogers argued that the "fee bears *no relationship* to what is actually taking place at the Site." Pet. App. 43a (emphasis added). Accordingly, the TIF would appear to violate not only *Dolan v. City of Tigard*, 512 U.S. 374 (1994), requiring heightened scrutiny of the exactions, but also the more fundamental "essential nexus" requirement of *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

The Oregon Court of Appeals surveyed the case law of both this Court and other courts, and concluded that while the heightened scrutiny standard articulated in *Dolan* could be applied to monetary exactions that are imposed in an ad hoc adjudicatory setting, citing *Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal. 1996), the TIF did not meet that criteria. Rather, the court below concluded that it would not extend *Dolan* (nor, for that matter, any level of Fifth Amendment protection) to a "generally applicable development fee [like the TIF] imposed on a broad range of specific, legislatively determined subcategories of property through a scheme that leaves no meaningful discretion either in the imposition or in the calculation of the fee." *Rogers Machinery, Inc. v. Washington County*, 45 P.3d 966, 982 (Or. Ct. App. 2002); Pet. App. 36a. The Oregon Supreme Court thereafter denied review. *Rogers Machinery, Inc. v. Washington County*, 52 P.2d 1057 (Or. 2002).

REASONS FOR GRANTING THE PETITION

THE COURT SHOULD RESOLVE THE CLEAR SPLIT IN THE LOWER COURTS AS TO WHETHER HEIGHTENED SCRUTINY OF *NOLLAN* AND *DOLAN* APPLIES TO MONETARY EXACTIONS THAT ARE LEGISLATIVELY IMPOSED

The Petitioner has amply and cogently demonstrated that the lower courts are "hopelessly split" on the issue of the applicability of Dolan's heightened scrutiny to legislatively adopted exactions. *See* Pet. 5-12. Indeed, the lower court itself all but invited this Court to review the issues presented. As the Oregon Court of Appeals candidly recognized in its decision:

> The two questions that consequently have generated considerable litigation for lower courts are: (1) Does heightened scrutiny apply to nonpossessory exactions, such as development or impact fees like the TIF imposed in this case? (2) Does that scrutiny apply to exactions imposed through generally applicable legislation rather than individual adjudicative decisions?
>
> In the eight years since *Dolan* was decided, no consensus has emerged among lower courts on those questions and, so far, the Supreme Court has declined to grant certiorari in cases that might have provided further guidance. *See, e.g.*, *Parking Association of Georgia v. City of Atlanta*, 264 Ga 764, 450 S.E.2d 200 (1994), cert. den. 515 U.S. 1116 (1995) (*Dolan* does not apply to a development condition imposed through a legislative process rather than through individualized determinations); *Amoco Oil Co. v. Village of Schaumburg*, 661 N.E.2d 380, 277 Ill. App. 3d 926, 214 Ill. Dec. 526 (1995), cert den

> 519 U.S. 976, 136 L. Ed. 2d 325, 117 S. Ct. 413 (1996) (*Dolan* applies to legislatively imposed property development conditions). Lower court authority appears most sharply divided on the issue of *Dolan*'s application to monetary exactions. Some courts have declared, seemingly categorically, that *Dolan* is limited to dedications of property and does not extend to nonpossessory exactions, such as the payment of fees. Other courts have rejected that view, holding that *Dolan* potentially can extend to monetary exactions, at least in some circumstances. A similar split of authority exists in lower courts as to whether *Dolan* is limited to development conditions imposed through adjudicatory decisions or whether it extends to those imposed as a result of generally applicable legislation.

Pet. App. 21a-22a (footnotes omitted).

To begin with, there should be no doubt regarding the basic underlying proposition in this case: the Takings Clause in general covers requiring the payment of money. On this point, two cases suffice to contradict any doubt regarding the scope of the Takings Clause. In *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), the Court held that "the interest income generated by funds held in IOLTA accounts is the 'private property' of the owner of the principal" subject to the Takings Clause. *Id.* at 172. Similarly, in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), the Court held that a Florida statute confiscating interest, which accrued in an interpleader fund deposited with the state court, violated the Takings Clause. *Id.* at 164. There should remain no question that the Takings Clause generally extends to regulations requiring the payment of money.

To set a lower constitutional standard for monetary exactions than for easements and other real property dedications would invite local land use authorities to skirt

their constitutional duty to compensate by monetizing their demands. Since few land use problems are impervious to the payment of money, this bifurcated approach to exactions would only test whether a local land use authority has "a stupid staff." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1025 n.12 (1992). Thus, excluding money from the protection of the Takings Clause would lead to that clause's circumvention.

For example, rather than restricting outright the development of the two beachfront lots at issue in *Lucas*, assume that a "beach impact fee" was instead assessed pursuant to a legislative program as a condition on the issuance of a building permit. Assume further that the impact fee was set at such a high amount that it would either a) be cost prohibitive for the owner to develop the property, and thus, force the owner to leave it in its natural condition as the State originally desired, or b) provide the State with sufficient funds to purchase the property (or similar property) before any development commenced, paying compensation to the owner from the funds that were exacted from him.

More pertinently, the dedications of property interests in the form of easements required as conditions for the issuance of building permits in both *Nollan* and *Dolan* could easily have been monetized in the form of an impact fee. The funds so generated could then be used to purchase the very easements desired by the governmental authorities, all without any meaningful judicial scrutiny, let alone the heightened scrutiny that would otherwise have been required. To permit such an easy method of circumventing the Fifth Amendment would fly in the face of the Supreme Court's clear direction that the Takings Clause is "more than a pleading requirement, and compliance with it . . . more than an exercise in cleverness and imagination." *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 841 (1987).

It lies beyond dispute that property "denote[s] the group of rights inhering in the citizen's relation to the

physical thing, as the right to possess, use and dispose of it." *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). A noted constitutional scholar has highlighted the conceptual emptiness of exempting monetary exactions from coverage under the *Nollan* and *Dolan* tests, merely because the government cannot be said to have physically invaded the owner's property:

> Prior to the United States Supreme Court's remand in *Ehrlich*, some state and federal courts drew an artificial distinction between dedications and monetary exactions for purposes of heightened scrutiny. For example, cases from California and various federal circuits lamely had denied heightened scrutiny for exactions on the basis of the lack of physical invasion associated with monetary demands. This kind of "thingness" view of property is enough to give a long-time property instructor the willies, as it suggests that far too many judges apparently forgot or failed to comprehend the conceptual nature of property taught to them in their first year of law school.

Douglas W. Kmiec, *Inserting The Last Remaining Pieces Into The Takings Puzzle*, 38 WM. & MARY L. REV. 995, 1037 (1997).

Having explained why the Takings Clause covers the payment of money and why the distinction between monetary exactions and exactions in other forms cannot be premised on the presence or absence of physical invasion, we are left with the question whether *Nollan* and *Dolan* can be fairly read to exclude monetary exactions from heightened scrutiny. The short answer is that they cannot. At most, the Respondents might claim that they are silent on this precise question, because neither case involved a monetary exaction. But the crucial point is that neither decision says anything to positively exclude monetary exactions.

More importantly, the standards these decisions prescribe—"essential nexus," *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987), and "rough proportionality," *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994)—and the constitutional problems they address, *see* 483 U.S. at 837 and n.5, were framed by this Court in sufficient generality to apply in every exactions case. Monetary exactions are no exception.

Just as it should make no difference as to whether the property being exacted is an interest in real property in the form of a dedication, or the equivalent value in so-called "in lieu of" or impact fees, it should also make no difference as to whether the taking was the result of a particular adjudicative proceeding or the imposition of an across-the-board legislative scheme. Both methods can effectuate a taking of private property, and both can be extortionate in nature. *See* Inna Reznik, *The Distinction Between Legislative and Adjudicative Decision in* Dolan v. City of Tigard, 75 N.Y.U.L. REV. 242 (2000).

As Justice Thomas concluded about this precise question:

> It is hardly surprising that some courts have applied *Tigard*'s rough proportionality test even when considering a legislative enactment. It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can. Moreover, the general applicability of the ordinance should not be relevant in a takings analysis. * * * The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.

Parking Ass'n of Georgia, Inc. v. City of Atlanta, 515 U.S. 1116 (1995) (Thomas, J., joined by O'Connor, J., dissenting from denial of cert.).

Indeed, the property owner in *Nollan* was faced with a general legislative rather than an adjudicative permitting scheme that was administered by the California Coastal Commission. In *Nollan*, the law generally required that a coastal permit for the construction of any new house "whose floor area, height or bulk was more than 10% larger than that of the house it was replacing be conditioned on a grant of [beach] access." 483 U.S. at 830. Despite this general across-the-board requirement for all such development, this Court made clear that an "essential nexus" is required between the exaction of the property interest being demanded in that particular case and the government's interest in imposing it. *Id.* at 841-42.

Just as in *Nollan*, the permit condition in the instant case is imposed across-the-board under a legislative scheme that effectively leaves no discretion to the administrative officials. It is imposed for specified kinds of development, regardless of the actual impact of the development on increased traffic. More significantly, it is imposed despite the concession that there would be *no* traffic impact whatsoever caused by the construction of Petitioner's new building. Thus, the imposition of the TIF should be judged by the express purpose of the ordinance, namely, that it was adopted to "ensure that new development contributes to . . . improvements needed to accommodate additional traffic [actually] *generated* by such development." WCC § 3.17.020; Pet. App. 47a (emphasis added).

Simply put, there is no "additional traffic generated" by Petitioner's development. It should be noted that the TIF in this case is not imposed as a special assessment upon on all existing businesses to pay for governmental expenses associated with handling *current* traffic levels. That would be an entirely different case. Rather, by its own terms, the TIF is imposed to address *new* traffic caused by *new* development.

In short, this Court can easily reverse the lower court because it did not find, nor could it, *any* nexus between the development in question and the TIF imposed. This clearly violates the teachings of *Nollan*, thereby obviating the necessity for this Court to even reach the *Dolan* "rough proportionality" test. By definition, there is *no* proportion, let alone a rough one, between a traffic impact fee and a development that has zero impact on traffic.[2] Indeed, if Petitioner had built a new office building adjacent to a subway stop, and could demonstrate not only that would there be no new employees, but also that the actual automobile trips generated by his current staff would be reduced by fifty percent due to subway use, there would be a *negative* proportion or relationship between the fee imposed and the actual impact of the building on traffic.

At a minimum, amicus urges the Court to grant review in this case to make clear that there is *some* level of heightened judicial review of the imposition of development fees, whether legislatively or administratively determined. As it now stands, the lower court couched its decision in "all or nothing" terms: either *Nollan* and *Dolan* apply or nothing does. The lower court provided no standards for review of such legislatively imposed impact fees; it is, quite simply, standardless. TIF thus impermissibly imposes an irrebuttable presumption that

---

[2] Amicus notes that a Petition for Writ of Certiorari similar to the instant one is pending in *Agencia La Esperanza Corp., Inc. v. Orange County Board of Supervisors*, Sup. Ct. No. 02-638. In that case, there was admittedly *some* increased traffic associated with the development in question. However, the issue in that case is whether the significant traffic impact fee imposed by the legislatively adopted fee programs was all of out proportion to the minimal traffic impact actually caused by the development, and thus, violative of the "rough proportionality" standard of *Dolan*. Thus, this Court has the option of granting review in both this case and *Agencia*; alternatively, the Court may prefer to grant one of the Petitions while holding the other in abeyance pending decision of the one granted.

any and all development listed in the legislative scheme generates new traffic.

Quite properly, *Dolan* places the burden on the government to show that the permit condition being imposed is "roughly proportional" to the impact caused by the development. And while amicus submits that the same burden should apply here, shouldn't the property owner in this or any other exaction case at least be afforded the opportunity to voluntarily bear the burden to rebut the government's presumption that his development will cause the legislatively determined impacts? Amicus submits that the answer to that question should be a resounding "yes."[3]

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted.

Daniel J. Popeo
Paul D. Kamenar
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Date: December 16, 2002

---

[3] Amicus notes that not only does the express language of the ordinance speak in terms of actual traffic generated rather than theoretically possible impacts, but also that other language in the ordinance confirms that notion. Thus, the ordinance acknowledges that certain categories of development requiring a building permit may not have been covered in setting traffic impact fee formulas; in such a case, the director may "[a]t the election (and expense) of the applicant, consider *actual* trip generation of a same or similar use verified by a registered traffic engineer." WCC § 3.17.050(B)(2). Pet. App. 52a (emphasis added).

Supreme Court, U.S.
FILED
DEC 16 2002
OFFICE OF THE CLERK

(6)

No. 02-750

In The
Supreme Court of the United States

ROGERS MACHINERY COMPANY, INC.
Petitioner,

v.

WASHINGTON COUNTY AND CITY OF TIGARD,
Respondents.

On Petition for Writ of Certiorari to the Court of Appeals of Oregon

BRIEF OF DEFENDERS OF PROPERTY RIGHTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Nancie G. Marzulla*
DEFENDERS OF PROPERTY RIGHTS
1350 Connecticut Ave., NW
Suite 410
Washington, DC 20036
(202) 822-6770

December 15, 2002 *Counsel of Record for *Amicus Curiae*

21 pp

QUESTION PRESENTED

Amicus curiae will address the following issue presented for review:

Must a traffic impact fee, imposed by a local government as a condition of a development permit, be "roughly proportional" to the impact of the proposed development under the Fifth Amendment?

TABLE OF CONTENTS

QUESTION PRESENTED.....i

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....iii

IDENTITY AND INTEREST OF *AMICUS CURIAE*.....1

STATEMENT OF THE CASE.....2

SUMMARY OF ARGUMENT.....3

REASONS FOR GRANTING THE PETITION.....9

The Court Should Address This Important Constitutional Question: Does *Dolan* Apply to Legislative Exactions?.....9

This Issue Is Enormously Significant for Landowners Because Such Exactions Tremendously Burden Their Ability to Use and Develop Their Property.....12

CONCLUSION.....15

TABLE OF AUTHORITIES

Cases **Page**

Benchmark Land Co. v. City of Battle Ground, 14 P.3d 172 (Wash. 2000), *aff'd*, 49 P.3d 860 (Wash. 2002)..... 5

Clajon Products Corp. v. Petera, 70 F.3d 1566 (10th Cir. 1995) 6

Commercial Builders of Northern California v. City of Sacramento, 941 F.2d 872 (9th Cir. 1991), *cert. denied*, 504 U.S. 931 (1992).....6

Dolan v. City of Tigard, 512 U.S. 374 (1994).....*passim*

Ehrlich v. City of Culver City, 911 P.2d 949 (Cal. 1996), *cert. denied*, 519 U.S. 929 (1996).....5, 6, 10

Home Builders Association of Central Arizona v. City of Scottsdale, 930 P.2d 993 (Ariz. 1997), *cert. denied*, 521 U.S. 1120 (1997).....5, 6

Home Builders Association of Dayton and the Miami Valley v. City of Beavercreek, 729 N.E.2d 349 (Ohio 2000).....5

Krupp v. Breckenridge Sanitation Dist., 19 P.3d 687 (Colo. 2001).....5, 6

Manocherian v. Lenox Hill Hospital, 643 N.E.2d 479 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1995).....5

McCarthy v. City of Leawood, 894 P.2d 836 (Kan. 1995)....6

Nollan v. California Coastal Commission, 483 U.S. 825 (1987).....7

Northern Illinois Homebuilders Association v. County of DuPage, 649 N.E.2d 384 (Ill. 1995).....5

Parking Association of Georgia, Inc. v. City of Atlanta, 450 S.E.2d 200 (Ga. 1994), *cert. denied*, 515 U.S. 1116 (1995).....9

San Remo Hotel, L.P. v. City and County of San Francisco, 41 P.3d 87 (Cal. 2002).....5, 6

Schultz v. City of Grants Pass, 884 P.2d 569 (Or. 1995).....5

Town of Flower Mound v. Stafford Estates Ltd. Partnership, 71 S.W.3d 18 (Tex. App. Feb. 14, 2002).....6

Statutes and Constitutional Provisions

U.S. CONST. amend. V.....4

Secondary Sources

Amy C. Brandt, Comment, *Sedona's Sustainable Growth Ordinance: Testing the Parameters of Dolan v. City of Tigard*, 28 ARIZ. ST. L. J. 1297 (1996).....11, 14

Ann E. Carlson & Daniel Pollak, *Takings on the Ground: How the Supreme Court's Takings Jurisprudence Affects Local Land Use Decisions*, 35 U.C. DAVIS L. REV. 103 (2001).....13

WILLIAM FISCHEL, REGULATORY TAKINGS (1995).....8, 10

James L. Huffman & Elizabeth Howard, *The Impact of Land Use Regulations on Small and Emerging Businesses*, 5 J. SMALL & EMERGING BUS. L. 49 (2001) 7, 12, 13, 14

Pursuant to Rule 37.3 of the Rules of this Court, *amicus curiae* submits this brief in support of petitioner.[1] Both parties have consented to the filing of this brief.

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Defenders of Property Rights is a non-profit, public interest legal foundation dedicated to the preservation of constitutionally protected property rights. Defenders' mission is to protect those rights considered essential by the Framers of the Constitution and to promote the exercise of governmental power consistent with the constitutional limitations upon the exercise of that power. Defenders' goal of the vigorous protection of property rights recognizes the special role of federal courts in protecting those rights. Since its founding in 1991, Defenders has participated in every significant property rights case in this Court including *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, ___ U.S. ___, 122 S. Ct. 1465 (2002);

---

[1] No counsel for either party authored this brief *amicus curiae*, either in whole or in part. Furthermore, no persons other than *amicus curiae*

Palazzolo v. Rhode Island, 533 U.S. 606 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *Bennett v. Spear*, 520 U.S. 154 (1997); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Keene Corp. v. United States*, 508 U.S. 200 (1993); and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

STATEMENT OF THE CASE

Petitioners, Rogers Machinery Company, Inc. ("Rogers"), planned to construct a new corporate headquarters in Tigard, Oregon. Rogers applied with the respondent, the city of Tigard ("city"), for a building permit for the new headquarters. After reviewing the permit application and other materials relating to the proposed development, the city assessed Rogers a traffic impact fee of

---

contributed financially to the preparation of this brief.

$37,102 pursuant to Washington County Code § 3.17, a fee assessed against property developers to provide funds for improvements to city streets and arterials. *See Rogers Machinery Company, Inc. v. Washington County,* 45 P.3d 966, 967 (Or. Ct. App 2002). Rogers ultimately payed but challenged the fee in the state circuit court, asserting that the traffic impact fee violated the Just Compensation Clause of the Fifth Amendment. The circuit court dismissed the challenge, characterizing the fee as a tax not subject to a Just Compensation claim. The Court of Appeals of Oregon affirmed the circuit court's decision, but characterized the fee as a legislatively imposed monetary exaction not subject to heightened takings scrutiny under *Dolan v. City of Tigard*, 512 U.S. 374 (1994). *See Rogers Machinery Company, Inc.*, 45 P.3d at 983. Petitioner now seeks review from this Court.

SUMMARY OF ARGUMENT

This Court held in *Dolan* that conditions that local or state governments place on the approval of a development

permit (referred to as exactions hereinafter) had to be "roughly proportional" to the impact of the proposed development to pass muster under the Just Compensation of the Fifth Amendment:[2]

> We think a term such as 'rough proportionality' best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the proposed development.

Dolan, 512 U.S. 374, 391 (1994).

This case raises the issue of whether the "rough proportionality" standard articulated in *Dolan* applies to monetary exactions imposed legislatively by local governments. Lower courts are in disarray over how to apply the rough proportionality test. One dispute is over the issue of whether exactions, monetary or otherwise, adopted in a legislative context are subject to the rough proportionality test.

---

[2] "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

A number of lower courts have applied *Dolan* to legislatively adopted exactions. *See, e.g., Northern Illinois Homebuilders Association v. County of DuPage*, 649 N.E.2d 384 (Ill. 1995); *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1995); *Home Builders Association of Dayton and the Miami Valley v. City of Beavercreek*, 729 N.E.2d 349 (Ohio 2000); *Schultz v. City of Grants Pass,* 884 P.2d 569 (Or. 1995); *Benchmark Land Co. v. City of Battle Ground*, 14 P.3d 172 (Wash. 2002). Other courts have declined to extend *Dolan* beyond the realm of adjudicative exactions. *See, e.g., Home Builders Association of Central Arizona v. City of Scottsdale*, 930 P.2d 993 (Ariz. 1997), *cert. denied*, 521 U.S. 1120 (1997); *San Remo Hotel, L.P. v. City and County of San Francisco*, 41 P.3d 87 (Cal. 2002); *Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal. 1996), *cert. denied*, 519 U.S. 929 (1996); *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 698 (Colo. 2001).

In addition, there is also confusion among lower courts as to whether *Dolan* applies to monetary exactions. Some lower courts have declared that *Dolan* only applies to physical dedications, not to monetary exactions. *See, e.g., Clajon Products Corp. v. Petera*, 70 F.3d 1566, 1578 (10th Cir. 1995); *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872, 875-76 (9th Cir. 1991), *cert. denied*, 504 U.S. 931 (1992); *McCarthy v. City of Leawood*, 894 P.2d 836 (Kan. 1995). Other courts have indicated that heightened takings scrutiny could extend to monetary exactions, but only to those imposed on an adjudicative basis. *See, e.g., Home Builders Ass'n of Central Arizona*; *San Remo Hotel; Ehrlich*; *Krupp*; *Town of Flower Mound v. Stafford Estates Ltd. Partnership*, 71 S.W.3d 18, 30-31 (Tex. App. Feb. 14, 2002).

This uncertainty in *Dolan*'s applicability to the context of monetary exactions imposes a significant burden on property owners and local governments. Local governments often use these fees to spread infrastructure

expenses. At the same time, these fees significantly burden property owners operating small and emerging businesses who want to develop their property, but who are not as financially well-equipped to pay such fees as larger businesses are. *See* James L. Huffman & Elizabeth Howard, *The Impact of Land Use Regulations on Small and Emerging Businesses*, 5 J. SMALL & EMERGING BUS. L. 49, 68 (2001) ("A large business has essentially the same cost of compliance as a small business, while generating significantly more resources that can be used to pay that cost").

Assessment of such fees without a constitutional limit such as rough proportionality chills the constitutionally protected right to make reasonable and beneficial use of property if such fees are prohibitively costly. As this Court has stated, "the right to build on one's own property cannot remotely be described as a 'governmental benefit.'" *Nollan v. California Coastal Commission*, 483 U.S. 825, 833 n. 2 (1987).

Furthermore, the Court should address the lower courts' collective uncertainty as to whether *Dolan* applies to exactions, monetary and otherwise, adopted legislatively because of the peculiar nature and structure of local governments. Property owners and developers routinely find themselves at the mercy of greedy local decision makers, with no procedural safeguards against excessive fees, but for the constitutionally guaranteed right to property right protections. *See* WILLIAM FISCHEL, REGULATORY TAKINGS at 289-324 (1995). There is "no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation . . ." *Dolan,* 512 U.S. at 392.

REASONS FOR GRANTING THE PETITION

I. The Court Should Address This Important Constitutional Question: Does *Dolan* Apply to Legislative Exactions?

In his dissent from this Court's denial of certiorari in *Parking Association of Georgia, Inc. v. City of Atlanta*, 450 S.E.2d 200 (Ga. 1994), *cert. denied*, 515 U.S. 1116 (1995), Justice Thomas dismissed the legislative-versus-adjudicative distinction as constitutionally irrelevant in a regulatory takings analysis:

> It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking . . . Moreover, the general applicability of a the ordinance should not be relevant in a takings analysis . . . The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.

Parking Ass'n of Georgia, 515 U.S. at 1116.

This constitutional distinction between legislative and adjudicative exactions is premised on the supposed relatively "heightened risk of extortion" in the context of adjudicative

exactions. *See Ehrlich,* 911 P.2d at 444. As petitioners correctly point out, the risk of extortion results from an inequity of bargaining power, which is greatest at the time when an applicant seeks a development permit from the local government that has the power to permit the applicant's development. *See* Petitioners Brief at 14. Thus, whether the exaction is imposed pursuant to a legislative formula or in an adjudicative setting is irrelevant to the applicant.

As economist William Fischel has observed, owners of undeveloped land are particularly susceptible to confiscatory regulatory behavior on the part of local governments. *See* WILLIAM FISCHEL, REGULATORY TAKINGS at 101, 133, 289-324 (1995). Such owners often lack the ability to exit the locality, and the legislative structure of local governments simply does not allow for the logrolling and pressure by special interests that would afford developers adequate protection from being charged excessive exactions. *See id.* at 289-324.

In fact, many local governments enact ordinances affecting property owners in fora that do not afford property owners the benefit of a public hearing. *See, e.g.,* Amy C. Brandt, Comment, *Sedona's Sustainable Growth Ordinance: Testing the Parameters of Dolan v. City of Tigard*, 28 ARIZ. ST. L. J. 1297, 1329 (1996).

For example, the city of Sedona, Arizona adopted a growth management ordinance by initiative, rather than through hearings that would have allowed for representative decision-making and deliberation between competing interests:

> Sedona residents . . . passed a growth management ordinance severely restricting the property rights of some owners of undeveloped parcels. Many of the traditional safeguards usually present in legislative action, like the rigors of public hearings, were not present in this case. Indeed, the ordinance was even called a 'mystery.'

Id. (citing Joani Knowles, *Mystery Growth Initiative May See Daylight*, SEDONA RED, Dec. 1, 1995, at 1A).

This distinction articulated by the case law would allow local governments to improperly circumvent the rough proportionality requirement of *Dolan* without affording procedural safeguards to property owners.

II. This Issue Is Enormously Significant for Landowners Because Such Exactions Tremendously Burden Their Ability to Use and Develop Their Property.

Monetary exactions like the fee at issue impact the rights of property owners and developers as significantly as pure possessory exactions do. Many local governments have begun to employ impact fees in conjunction with development permits with greater frequency as an alternative to taxation and to circumvent *Dolan*. *See, e.g.*, James L. Huffman & Elizabeth Howard, *The Impact of Land Use Regulations on Small and Emerging Businesses*, 5 J. SMALL & EMERGING BUS. L. 49, 65-66 (2001) ("Local governments have a tendency to abuse their power to impose exactions on property owners . . .[S]tate and local governments continue to expand exactions and resist compliance with the Supreme

Court's rulings"); Ann E. Carlson & Daniel Pollak, *Takings on the Ground: How the Supreme Court's Takings Jurisprudence Affects Local Land Use Decisions*, 35 U.C. DAVIS L. REV. 103, 107 (2001) ("[T]he *Nollan* and *Dolan* cases appear to encourage many jurisdictions to shift away from demanding land exactions from developers and towards imposing fees"). Their increased usage merits constitutional scrutiny, lest local and state government run roughshod over the rights of property owners to develop and use their property.

Monetary exactions have a disproportionate impact on small businesses eager to develop their property. As one commentator has observed, the costs of doing business "vary with the size and number of a business' activities, [but] costs associated with compliance with most regulations [i.e. monetary exactions] are relatively fixed." James L. Huffman & Elizabeth Howard, *The Impact of Land Use Regulations on Small and Emerging Businesses*, 5 J. SMALL & EMERGING BUS. L. 49, 68 (2001). These fixed costs of regulatory

compliance are relatively more acute for small and fledgling business because larger businesses generate "significantly more resources that can be used to pay that cost." *See id.* These obstacles can prevent or deter a small business' entry into the marketplace, and thus, the use of their property: "Because land use regulations usually involve permitting, . . . most of the compliance costs are borne before a project can be launched." *See id.* Providing some limit to these fees would relieve small businesses of this burden and permit economic use of their property.

Application of a limit like rough proportionality to monetary exactions would neither eliminate their use nor prove impracticable. Impact fees are readily amenable to application of the rough proportionality standard. *See* Amy C. Brandt, Comment, *Sedona's Sustainable Growth Ordinance: Testing the Parameters of Dolan v. City of Tigard*, 28 ARIZ. ST. L. J. 1297, 1323 ("[C]ities can readily quantify the costs of the proposed development and charge an impact fee accordingly"). Application of the rough

proportionality standard to such fees would simply limit the fees charged, not eliminate their use as a way to mitigate the impact of property development.

CONCLUSION

Accordingly, for all the foregoing reasons, *amicus curiae* strongly urges this Court to grant the requested Petition for Writ of Certiorari.

Respectfully submitted,

Nancie G. Marzulla*
DEFENDERS OF PROPERTY RIGHTS
1350 Connecticut Ave., NW
Suite 410
Washington, DC 20036
202-822-6770

December 15, 2002 *Counsel of Record for *Amicus Curiae*

No. 02-750

Supreme Court, U.S.
FILED
DEC 16 2002
OFFICE OF THE CLERK

In The
Supreme Court of the United States

ROGERS MACHINERY CO., INC.,

Petitioner,

v.

CITY OF TIGARD, AND
WASHINGTON COUNTY,

Respondents.

**On Petition For A Writ Of Certiorari
To The Oregon Court Of Appeals**

BRIEF OF *AMICUS CURIAE* TEXAS JUSTICE FOUNDATION IN SUPPORT OF THE PETITION

STUART BUCK
1717 Main St., Suite 2800
Dallas, TX 75201
(214) 939-5426

ALLAN E. PARKER, JR.
Counsel of Record
R. CLAYTON TROTTER
TEXAS JUSTICE FOUNDATION
8122 Datapoint, Suite 812
San Antonio, TX 78229
(210) 614-7157

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

30 pp

QUESTION PRESENTED

1. Whether, under the Takings Clause, the test of *Dolan v. City of Tigard*, 512 U.S. 374 (1994), applies to a monetary exaction on land development imposed pursuant to a legislative scheme?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	1
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	3
I. The Circuits and State Courts Are Divided Over Whether to Apply *Dolan* to Fees and to Legislative Enactments	3
A. Fees	3
B. Legislative Acts	4
C. This Case Squarely Presents a Conflict on Both Issues	5
II. The Decision Below Was Incorrect	5
A. The Court Below Erred in Concluding that Fees Receive Less Scrutiny Under *Dolan*	5
B. The Court Below Erred in Concluding that the Fee Here was Legislative Rather Than Adjudicative	7
C. The Court Below Erred in Concluding That *Dolan* Should Not Apply to Legislative Enactments	10
1. No Branch of Government is Exempt from the Takings Clause	10
2. The Legislative/Adjudicative Distinction is Unworkable and Irrelevant	14

TABLE OF CONTENTS – Continued

Page

3. The *Dolan* Court's Concerns Are More Readily Addressed by a Facial/As-Applied Distinction 17

CONCLUSION 20

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Armstrong v. United States, 364 U.S. 40 (1960).....12

Avery v. Midland County, 390 U.S. 474 (1968).....15

Bannum, Inc. v. City of Louisville, 958 F.2d 1354 (CA6 1992).....17

Bi-Metallic Investment Co. v. State Bd. of Equalization of Colorado, 239 U.S. 441 (1915).....11

Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226 (1897).....10, 11

Christopher Lake Dev. Co. v. St. Louis County, 35 F.3d 1269 (CA8 1994).....3

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999).....2, 3

Clajon Prod. Corp. v. Petera, 70 F.3d 1566 (CA10 1995).....3

Daniels v. Area Plan Comm'n of Allen County, 306 F.3d 445 (CA7 2001).....19

Dolan v. City of Tigard, 512 U.S. 374 (1994).....*passim*

Dreyer v. Illinois, 187 U.S. 71 (1902).....14

Duquesne Light Co. v. Barasch, 488 U.S. 299 (1989).....11

Ex Parte Virginia, 100 U.S. 339 (1879).....10

FM Properties Operating Co. v. City of Austin, 93 F.3d 167 (CA5 1996).....17

FTC v. Ruberoid Co., 343 U.S. 470 (1952).....17

Garneau v. City of Seattle, 147 F.3d 802 (CA9 1998).....3, 6, 7

Harris v. City of Wichita, 862 F. Supp. 287 (D. Kan. 1994).....4

TABLE OF AUTHORITIES – Continued

Page

Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence, 927 F.2d 1111 (CA10 1991) 17

Londoner v. City of Denver, 210 U.S. 373 (1908) 11

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 11

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 11, 20

Minnesota v. Clover Lear Creamery Co., 449 U.S. 456 (1981) 15

Monongahela Nav. Co. v. United States, 148 U.S. 312 (1893) 12

New Port Largo, Inc. v. Monroe County, 95 F.3d 1084 (CA11 1996) 17

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) 3, 4

Parking Ass'n of Georgia, Inc. v. City of Atlanta, 515 U.S. 1116 (1995) 2, 12, 14

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 11

Prentis v. Atlantic Coast Line Co., 211 U.S. 210 (1908) 16

Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362 (1894) 10

Rent Stabilization Ass'n of City of New York v. Dinkins, 5 F.3d 591 (CA2 1993) 19

Scott v. McNeal, 154 U.S. 34 (1894) 10

Shelton v. City of College Station, 780 F.2d 475 (CA5 1986) 14, 17

TABLE OF AUTHORITIES – Continued

Page

Smithfield Concerned Citizens for Fair Zoning v. Town of Smithfield, 907 F.2d 239 (CA1 1990) 17

Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997) 19

Texas Manufactured Housing Ass'n v. Nederland, 101 F.3d 1095 (CA5 1996) 3

United States v. Florida East Coast Railway Co., 410 U.S. 224 (1973) 16

United States v. Salerno, 481 U.S. 739 (1987) 18, 19

Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) 19

STATE CASES

Amoco Oil Co. v. Village of Schaumburg, 661 N.E.2d 380 (Ill. App. Ct. 1995) 4, 12

Arcadia Dev. Corp. v. City of Bloomington, 552 N.W.2d 281 (Minn. Ct. App. 1996) 4

Arnel Dev. Co. v. City of Costa Mesa, 620 P.2d 565 (Cal. 1980) 16

Art Piculell Group v. Clackamas County, 922 P.2d 1227 (Or. Ct. App. 1996) 6

Benchmark Land Co. v. City of Battleground, 14 P.3d 172 (Wash. Ct. App. 2000) 4, 7

Board of County Comm'rs v. Karp, 662 So.2d 718 (Fla. Dist. Ct. App. 1995) 16

Board of County Comm'rs v. Snyder, 627 So.2d 469 (Fla. Dist. Ct. App. 1993) 16

Call v. West Jordan, 606 P.2d 217 (Utah 1979) 6

TABLE OF AUTHORITIES – Continued

Page

City of College Station v. Turtle Rock Corp., 680 S.W.2d 802 (Tex. 1984) 6

County of Lancaster v. Mecklenburg County, 434 S.E.2d 604 (N.C. 1993) 17

Curtis v. Town of South Thomaston, 708 A.2d 657 (Me. 1998) 5

Divan Builders, Inc. v. Planning Bd. of Twp. of Wayne, 334 A.2d 30 (N.J. 1975) 6

Ehrlich v. City of Culver City, 911 P.2d 429 (Cal. 1996) 3, 4

Ehrlich v. City of Culver City, 15 Cal. App. 4th 1737, 19 Cal. Rptr. 2d 468 (Cal. App. 2d Dist. 1993) 5, 6

Fasano v. Bd. of County Comm'rs, 507 P.2d 23 (Or. 1973) 16

Homebuilders Ass'n v. City of Scottsdale, 902 P.2d 1347 (Ariz. Ct. App. 1995) 8

Homebuilders Ass'n v. City of Scottsdale, 930 P.2d 993 (Ariz. 1997) 3, 4

Jenad, Inc. v. Scarsdale, 218 N.E.2d 673 (N.Y. 1966) 6

Jordan v. Village of Menomonee Falls, 137 N.W.2d 442 (Wis. 1965) 6

Kottschade v. City of Rochester, 537 N.W.2d 301 (Minn. Ct. App. 1995) 5

Krupp v. Breckenridge Sanitation Dist., 19 P.3d 687 (Colo. 2001) 4, 8, 9

Landgate, Inc. v. California Coastal Comm'n, 953 P.2d 1188 (Cal. 1998) 17

TABLE OF AUTHORITIES – Continued

Page

Lexington-Fayette Urban County Gov't v. Schneider, 849 S.W.2d 557 (Ky. Ct. App. 1992) 3

Manocherian v. Lenox Hill Hosp., 643 N.E.2d 479 (N.Y. 1994) 4

McCarthy v. City of Leawood, 894 P.2d 836 (Kan. 1995) 3

Northern Ill. Home Builders Ass'n v. County of Du Page, 649 N.E.2d 384 (Ill. 1995) 3

Parking Ass'n of Georgia, Inc. v. City of Atlanta, 450 S.E.2d 200 (Ga. 1994) 4

Pringle v. City of Wichita, 917 P.2d 1351 (Kan. Ct. App. 1996) 4

Rogers Machinery Co. v. City of Tigard, 45 P.3d 966 (Ore. Ct. App. 2002) 5, 8, 9, 13

Rogers Machinery Co. v. City of Tigard, 52 P.3d 1057 (Or. 2002) 5

San Remo Hotel L.P. v. San Francisco, 41 P.3d 87 (Cal. 2002) ..... *passim*

Southeast Cass Water Resource Dist. v. Burlington Northern R.R. Co., 527 N.W.2d 884 (N.D. 1995) 4

Town of Flower Mound v. Stafford Estates, 71 S.W.3d 18 (Tex.App.-Fort Worth, 2002) 3, 4, 6, 17

Trimen Dev. Co. v. King County, 877 P.2d 187 (Wash. 1994) 3

Waters Landing Ltd. v. Montgomery County, 650 A.2d 712 (Md. 1994) 4

TABLE OF AUTHORITIES – Continued

Page

UNITED STATES CONSTITUTION

Amend. V ..... *passim*

Amend. XIV 11

OTHER AUTHORITIES

Briffault, *Our Localism: Part I – The Structure of Local Government Law*, 90 Colum. L. Rev. 1 (1990) 15

Briffault, *Who Rules at Home?: One Person/One Vote and Local Governments*, 60 U. Chi. L. Rev. 339 (1993) 15

Carlson & Pollak, *Takings on the Ground: How the Supreme Court's Takings Jurisprudence Affects Local Land Use Decisions*, 35 U.C. Davis L. Rev. 7, 12103 (2001) 7, 12

Hansen, *Quasi-Judicial Land-Use Decision Making in New Castle County*, 4 Del. L. Rev. 191 (2001) 16

Hershkoff, *State Courts and the 'Passive Virtues': Rethinking the Judicial Function*, 114 Harv. L. Rev. 1833 (2001) 15

Kmiec, *Private Property and the Future of Government Regulation: Inserting the Last Remaining Pieces into the Takings Puzzle*, 38 Wm. & Mary L. Rev. 995 (1997) 12

Reznik, *The Distinction Between Legislative and Adjudicative Decisions in* Dolan v. City of Tigard, 75 N.Y.U. L. Rev. 242, 265 (2000) 9, 15

Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 Cal. L. Rev. 839 (1983) 15

INTEREST OF *AMICUS CURIAE*

This brief *amicus curiae* in support of the petition is submitted pursuant to Rule 37 of the Rules of this Court.[1] Petitioner and respondents have consented to the filing of this brief, and their consent letters have been filed with the Clerk of this Court.

Amicus is the Texas Justice Foundation, a public interest legal institute that seeks to protect, through litigation and education, fundamental freedoms and rights essential to the preservation of American society. *Amicus* is especially concerned that doubtful and conflicting precedents under the United States Constitution's Takings Clause will undermine the protections of that Clause.

SUMMARY OF ARGUMENT

This case raises two important issues about how to apply the test of *Dolan v. City of Tigard*, 512 U.S. 374 (1994), to land development exactions. The first issue over which courts have split is whether *Dolan* applies to monetary exactions or whether it applies only where the government has required a physical dedication of land.

The second issue over which courts have split is whether *Dolan* applies to so-called "legislative" exactions, or whether its application is restricted to so-called "adjudicative" exactions. Two members of this Court noted

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

the existence of this split over seven years ago in *Parking Ass'n of Georgia, Inc. v. City of Atlanta*, 515 U.S. 1116 (1995) (Thomas, J., joined by O'Connor, J., dissenting from denial of cert.). The split has only worsened since, and should at long last be resolved by this Court.[2]

Moreover, the court below erred in three important ways. It erroneously held that fees are subject to lower scrutiny under *Dolan* than are physical dedications, even though this Court's jurisprudence makes it clear that fees should receive the same scrutiny. It erroneously held that the fee levied on Rogers Machinery was "legislative" merely because a generally applicable and non-discretionary statute authorized it, even though adjudications almost always involve the construal and application of some such statute. And it erroneously held that *Dolan* does not apply to so-called "legislative" enactments, even though there is no constitutional reason to make such a distinction and, as experience shows, no predictable way to distinguish "legislation" from "adjudication" in the local land-use context.

---

[2] As Justice Thomas pointed out, the "confused nature" of the Court's takings jurisprudence and the "fact-specific nature" of takings claims has counseled the granting of certiorari where the lower court had simply misapplied a prior Court precedent. *Id.* (citing, *e.g.*, *Dolan*, 512 U.S. at 383); *see also City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999) (granting certiorari to determine whether the lower court properly applied *Dolan*). Where not only one but two conflicts present themselves in a single case, review by this Court is all the more desirable.

ARGUMENT

I. The Circuits and State Courts Are Divided Over Whether to Apply *Dolan* to Fees and to Legislative Enactments

A. Fees

Courts have split over whether to apply *Dolan* to fees imposed on new land development. Some courts have held that *Dolan* and/or *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), do apply to such fees. *See, e.g., San Remo Hotel L.P. v. San Francisco*, 41 P.3d 87, 102-03 (Cal. 2002); *Town of Flower Mound v. Stafford Estates*, 71 S.W.3d 18, 31-34 (Tex.App.-Fort Worth, 2002); *Ehrlich v. City of Culver City*, 911 P.2d 429, 443-44 (Cal. 1996); *Northern Ill. Home Builders Ass'n v. County of Du Page*, 649 N.E.2d 384, 388-90 (Ill. 1995); *Trimen Dev. Co. v. King County*, 877 P.2d 187, 194 (Wash. 1994); *Lexington-Fayette Urban County Gov't v. Schneider*, 849 S.W.2d 557, 559-60 (Ky. Ct. App. 1992) (applying *Nollan*); *see also Christopher Lake Dev. Co. v. St. Louis County*, 35 F.3d 1269, 1275 (CA8 1994).

On the other hand, several state and federal courts have reasoned that *Dolan* applies only to physical dedications of land. *See, e.g., Garneau v. City of Seattle*, 147 F.3d 802, 812 (CA9 1998); *Texas Manufactured Housing Ass'n v. Nederland*, 101 F.3d 1095, 1105 (CA5 1996); *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1578-79 (CA10 1995); *Homebuilders Ass'n of Central Arizona v. City of Scottsdale,* 930 P.2d 993, 1000 (Ariz. 1997); *McCarthy v. City of Leawood*, 894 P.2d 836, 845 (Kan. 1995).

Some of the confusion is due to a dictum in *City of Monterey, supra*, where the Court noted that *Dolan* applied only to "exactions – land-use decisions conditioning approval of development on the *dedication of property* to

public use." 526 U.S., at 702 (emphasis added). Some courts rely on this language to hold that *Dolan* does not apply to fees, *see, e.g.*, *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 697 (Colo. 2001), while other courts take an opposite view, *see, e.g.*, *Town of Flower Mound*, 71 S.W.3d at 31-32; *Benchmark Land Co. v. City of Battleground*, 14 P.3d 172, 173-75 (Wash. Ct. App. 2000).

B. Legislative Acts

Many courts have held that legislative acts are not subject to *Dolan*'s heightened scrutiny. *See, e.g.*, *Harris v. City of Wichita*, 862 F. Supp. 287, 294 (D. Kan. 1994); *San Remo Hotel*, 41 P.3d at 104; *Ehrlich*, 911 P.2d at 447 (observing in dicta that *Dolan* need not apply to "generally applicable" fees); *Pringle v. City of Wichita*, 917 P.2d 1351, 1357 (Kan. Ct. App. 1996); *Arcadia Dev. Corp. v. City of Bloomington*, 552 N.W.2d 281, 286 (Minn. Ct. App. 1996); *Scottsdale*, 930 P.2d at 1000; *Southeast Cass Water Resource Dist. v. Burlington Northern R.R. Co.*, 527 N.W.2d 884, 896 (N.D. 1995); *Parking Ass'n of Georgia, Inc. v. City of Atlanta*, 450 S.E.2d 200, 203 n.3 (Ga. 1994); *Waters Landing Ltd. Partnership v. Montgomery County*, 650 A.2d 712, 724 (Md. 1994).

On the other hand, several courts have applied *Dolan/Nollan* to legislative acts. *See, e.g.*, *Amoco Oil Co. v. Village of Schaumburg*, 661 N.E.2d 380, 389-90 (Ill. App. Ct. 1995); *Manocherian v. Lenox Hill Hosp.*, 643 N.E.2d 479, 482-85 (N.Y. 1994) (applying *Nollan* to statute requiring landlords to offer lease renewals to non-profit hospitals);

Kottschade v. City of Rochester, 537 N.W.2d 301, 307-08 (Minn. Ct. App. 1995).[3]

C. This Case Squarely Presents a Conflict on Both Issues

The case below squarely presents both issues. The Oregon Court of Appeals held that *Dolan* may apply to fees, but "*only* when the exaction has been imposed through an adjudicatory process." *Rogers Machinery Co. v. City of Tigard*, 45 P.3d 966, 977 (Or. Ct. App. 2002) (emphasis in original). The Oregon Supreme Court denied review without modifying any aspect of the lower court's decision. *Rogers Machinery Co. v. City of Tigard*, 52 P.3d 1057 (Or. 2002). Thus, both issues on which splits have occurred are presented in this case – ripe for this Court's resolution.

II. The Decision Below Was Incorrect

A. The Court Below Erred in Concluding that Fees Receive Less Scrutiny Under *Dolan*

This Court's previous actions make it clear that *Dolan* applies to fees as much as to physical dedications. First, the Court remanded *Ehrlich v. City of Culver City*, 15 Cal. App. 4th 1737, 19 Cal. Rptr. 2d 468 (Cal. App. 2d Dist.

---

[3] Another court applied *Dolan* to an ordinance requiring an easement for fire prevention purposes, but stated that it would "assign weight to the fact that the easement requirement derives from a legislative rule of general applicability and not an ad hoc determination made by the planning board at the time of the pending application." *Curtis v. Town of South Thomaston*, 708 A.2d 657, 660 (Me. 1998).

1993), for reconsideration in light of *Dolan*. *See* 512 U.S. 1231 (1994). And *Ehrlich* involved a statute requiring a fee, not a physical dedication. 15 Cal. App. 4th at 1742, 19 Cal. Rptr. 2d at 470. The Court's remand in *Ehrlich* "would have been an unnecessary waste of judicial resources" if *Dolan* did not apply to fees. *See Garneau*, 147 F.3d at 819 (O'scannlain, J., concurring and dissenting in part).

Second, *Dolan* itself surveyed many state court cases for guidance on the appropriate standard. *See Dolan*, 512 U.S. at 389 ("Since state courts have been dealing with this question a good deal longer than we have, we turn to representative decisions made by them."). Notably, many of the cases surveyed involved *fees* in lieu of physical dedications, indicating that the *Dolan* Court itself saw no meaningful distinction between physical dedications and fees in lieu thereof.[4]

Moreover, to apply *Dolan* to dedications but not fees would enormously complicate those cases in which local governments use *both* types of exactions, either simultaneously or as alternative options. As one court observed, the result would be a needlessly difficult form of "bifurcated review." *Town of Flower Mound*, 71 S.W.3d at 33 (citing as an example *Art Piculell Group v. Clackamas County*, 922 P.2d 1227, 1230 (Or. Ct. App. 1996)).

---

[4] The fee-in-lieu cases cited by *Dolan*, 512 U.S. at 389-91, include *Jenad, Inc. v. Village of Scarsdale*, 218 N.E.2d 673, 675-76 (N.Y. 1966); *Divan Builders, Inc. v. Planning Bd. of Twp. of Wayne*, 334 A.2d 30, 33 (N.J. 1975); *City of College Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 804 (Tex. 1984); *Call v. City of West Jordan*, 606 P.2d 217, 218 (Utah 1979); and *Jordan v. Village of Menomonee Falls*, 137 N.W.2d 442, 445 (Wis. 1965).

Most importantly, fees in exchange for development permits are the functional equivalent of physical dedications. As Judge O'scannlain has said, to treat fees and dedications differently "could lead to an absurd result: whereas a government would be constitutionally unable to pass a law forbidding landlords from evicting their tenants, the government could presumably accomplish the same goal . . . by simply passing a law requiring landlords to pay evicted tenants an exorbitant amount of money." *Garneau*, 147 F.3d at 821 (O'scannlain, J., concurring and dissenting in part); *see also Benchmark Land Co.*, 14 P.3d at 175 ("If the government in *Nollan* and *Dolan* had exacted money rather than land and then purchased land to solve the problems, the same questions would arise. . . . ").

In short, nothing in this Court's jurisprudence requires that fees should receive lower scrutiny. To apply lower scrutiny in such cases would ultimately facilitate the circumvention of *Dolan*, and complicate Takings Clause jurisprudence even further.[5]

B. The Court Below Erred in Concluding that the Fee Here was Legislative Rather Than Adjudicative

The Oregon Court of Appeals relied on two erroneous factors in determining that this case did not involve an

---

[5] It may well be, as some have argued, that a fee system is superior to a physical dedication system in that it can be more closely tailored to the impacts of any given development. Carlson & Pollak, *Takings on the Ground: How the Supreme Court's Takings Jurisprudence Affects Local Land Use Decisions*, 35 U.C. Davis L. Rev. 103, 137-38 (2001). But the fact that fees might more readily satisfy the *Dolan* test is no reason to hold that the *Dolan* test doesn't even apply.

"adjudication": The lack of administrative "discretion," and the "generally applicable" nature of the underlying law. Neither factor ought to be relevant.

Discretion – The court found much significance in the fact that the ordinance makes imposition of the Traffic Impact Fee "mandatory on 'all development in the county,'" *Rogers Machinery*, 45 P.3d at 980, and that "no significant discretion is involved in the TIF's imposition or calculation." *Id.*, at 981. What little discretion the administrators had, said the court, was not enough to convert the fee into "the kind of ad hoc adjudicatory decision that troubled the Court in *Dolan*." *Id.*, at 981 n.17.[6]

It is not clear, however, why the amount of discretion afforded to administrators has anything to do with whether a governmental action should be classified as legislative or adjudicative. By analogy, the United States Sentencing Guidelines severely limit the discretion afforded to trial judges, but this does not mean that criminal trials are no longer adjudications. The level of discretion possessed by the adjudicator is simply irrelevant to the legislative/adjudicative distinction.[7]

---

[6] *See also, e.g.*, *San Remo Hotel*, 41 P.3d at 104 (noting that the administrative body had no "discretion as to the imposition or size" of an exaction); *Krupp*, 19 P.3d at 695 (refusing to apply *Dolan* where the fee was not "discretionary"); *Homebuilders Ass'n v. City of Scottsdale*, 902 P.2d 1347, 1351 (Ariz. Ct. App. 1995) ("While *Dolan* also involved a city ordinance, the crucial distinction lies in the amount of adjudicative, staff-level discretion permitted by each ordinance").

[7] A further problem is that there is no way to specify *just how much* discretion would convert legislation into adjudication. As one commentator notes, surveys have shown that in roughly a third of all exactions nationwide, the administrator has some varying level of

(Continued on following page)

Generally applicable law – The Oregon court heavily relied on the fact that the fee is "imposed on broad classes of property," *Rogers Machinery*, 45 P.3d at 980, that it is "generally applicable," *id.*, at 981, and that it is "uniformly applied." *Id.*, at 981.[8]

Again, criminal law is generally applicable, but that does not prevent a criminal trial from being an adjudication. What characterizes an adjudication is that a pre-existing *law* (whether generally applicable or not) has been *applied* to a specific individual by a court, commission, or administrator.

As it now stands, the Oregon Court of Appeals and other lower courts apparently think that adjudications exist only where the adjudicator has free-wheeling authority to issue ad hoc decisions unconstrained by anything other than his own imagination. Such a view is anomalous. In almost *all* adjudications outside of the common law context, the adjudicator applies some law or regulation to a specific person. How broadly that law or regulation sweeps, or how much discretion it affords the adjudicator, are simply irrelevant.

---

flexibility. Inna Reznik, *The Distinction Between Legislative and Adjudicative Decisions in* Dolan v. City of Tigard, 75 N.Y.U. L. Rev. 242, 265 (2000).

[8] *See also, e.g.*, *San Remo Hotel*, 41 P.3d at 104 (noting that the government did not "single out" the plaintiffs); *Krupp*, 19 P.3d at 698 (refusing to apply *Dolan* where the fee was not "unique" to the plaintiffs).

C. The Court Below Erred in Concluding That *Dolan* Should Not Apply to Legislative Enactments

1. No Branch of Government is Exempt from the Takings Clause

From the earliest cases incorporating the Bill of Rights against the States, this Court has consistently held that a state may not avoid constitutional obligations by acting through one branch of government rather than another. In the very case that this Court always cites as incorporating the Takings Clause – *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226 (1897)[9] – the Court stated that the Takings Clause applies "to all the instrumentalities of the State, to its legislative, executive and judicial authorities," and that this "must be so, or, as we have often said, the constitutional prohibition has no meaning, and 'the State has clothed one of its agents with power to annul or evade it.'" *Id.*, at 233-34 (quoting *Ex Parte Virginia*, 100 U.S. 339, 346-47 (1879)); *see also Scott v. McNeal*, 154 U.S. 34, 45 (1894) (holding that the Fourteenth Amendment applies to "all acts of the State, whether through its legislative, its executive or its judicial authorities.").[10]

---

[9] *See, e.g., Dolan*, 512 U.S. at 384 n.5 (discussing Court's reliance on *Chicago* for incorporation). Note that an earlier case had apparently already incorporated the Takings Clause via the Equal Protection Clause. *See Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362, 399 (1894).

[10] Ironically, the dispute in *Chicago* was the precise opposite of the current dispute: On the unquestioned assumption that the Takings Clause applied to legislative action, the Court had to decide whether

(Continued on following page)

If this were a procedural Due Process case, and the question were whether Rogers Machinery deserved notice and opportunity for a hearing, then it would be relevant whether the government had acted via legislation or adjudication.[11] Unlike the Due Process Clause, however, the Takings Clause applies regardless of the form of government action, requiring compensation *whenever* the government takes private property for a public purpose.

Thus, all other Takings Clause tests apply with equal force to legislative action. If a state legislature, for example, passes a law requiring that an apartment building provide space for a cable box, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982), or that "denies all economically beneficial or productive use of land," *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992), or that goes "too far" in regulating land use, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), a compensable taking will have occurred. And if an administrative agency (acting in a quasi-legislative capacity) establishes confiscatory rates, it too will violate the Takings Clause. *See, e.g., Duquesne Light Co. v. Barasch*, 488 U.S. 299, 308 (1989).

In an oft-quoted statement, this Court has said that the purpose of the Takings Clause is to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the

---

state *adjudicative* action could violate the Takings Clause as well. *Chicago*, 166 U.S. at 236, 241.

[11] *Compare Londoner v. City of Denver*, 210 U.S. 373 (1908), *with Bi-Metallic Investment Co. v. State Bd. of Equalization of Colorado*, 239 U.S. 441 (1915).

public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).[12] The mere fact that a particular exaction is authorized by a statute does not prevent it from imposing an unfair burden on a given citizen.[13] As Justice Thomas has said, "A city council can take property just as well as a planning commission can." *Parking Ass'n of Georgia*, 515 U.S., at 1116 (Thomas, J., joined by O'Connor, J., dissenting from denial of cert.). *Cf.* Carlson & Pollak, *Takings on the Ground: How the Supreme Court's Takings Jurisprudence Affects Local Land Use Decisions*, 35 U.C. Davis L. Rev. 103, 131 (2001) (noting empirically that developers in some towns "may face excessive exactions whether or not the exactions are legislative enacted or applied on an ad hoc basis").[14]

---

[12] *See also Monongahela Nav. Co. v. United States*, 148 U.S. 312, 325 (1893) (stating that the Takings Clause "prevents the public from loading upon one individual more than his just share of the burdens of government").

[13] As one scholar has said, "it should matter little whether a particular land-use regulation originates with a legislative or an adjudicative pronouncement. What counts is whether the legislative determination has been brought to bear on particular property, either through the permitting and rezoning process or through initial mapping and classification." Kmiec, *Private Property and the Future of Government Regulation: Inserting the Last Remaining Pieces into the Takings Puzzle*, 38 Wm. & Mary L. Rev. 995, 1041-42 (1997).

[14] As an Illinois court has observed, a local government may not "skirt its obligation to pay compensation when taking private property for public use merely by having the Village Board of Trustees pass an 'ordinance' rather than having a planning commission issue a permit." *Amoco Oil Co.*, 661 N.E.2d at 389. The government "should not be able to insulate itself from a takings challenge merely by utilizing a different bureaucratic vehicle when expropriating its citizen's property." *Id.*, at 390.

The Oregon Court of Appeals reasoned, however, that legislation bears a lower risk of "extortion" than does adjudication.[15] Relying on a California case, the court theorized that generally applicable legislation would not be likely to result in "extortionate fees for all property development," because any such proposal would "face widespread and well-financed opposition." *Rogers Machinery,* 45 P.3d at 982 (quoting *San Remo*, 41 P.3d at 105). "Ad hoc individual monetary exactions deserve special judicial scrutiny mainly because, affecting fewer citizens and evading systematic assessment, they are more likely to escape such political controls." *Id.* (quoting *San Remo*, 41 P.3d at 105).

But this reasoning is unsupported. For example, in a densely-built area where most possible development has already occurred, a legislative exaction might easily place an unfair burden on the minority of developments that are new. Moreover, ad hoc monetary exactions might well be *more* fair because they can theoretically be more readily tailored to the impact of individual developments. Indeed, the petitioners here would be far better off if the City of Tigard had used a more ad hoc process that tailored the traffic fee to the actual level of increased traffic – which is to say, zero. *See* Pet. for Cert. at 15-16. And even if broadly-sweeping legislative enactments are less likely to be extortionate than narrow legislation or seat-of-the-pants adjudication, that is no reason to abandon judicial scrutiny where the application of such a law *is* extortionate. (Here as

[15] In other words, the court appeared to think that the Takings Clause applies not to takings per se, but only to those governmental processes that are assumed to be likely to produce takings.

elsewhere, it is completely counterintuitive to hold that where *Dolan* might be more easily satisfied, it should therefore not apply at all.)

The applicability of *Dolan* should not rest on such unsupported speculation about the political process. As Justice Thomas has said, "the general applicability of the ordinance should not be relevant in a takings analysis. . . . The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference." *Parking Ass'n of Georgia*, 515 U.S., at 1116 (Thomas, J., joined by O'Connor, J., dissenting from denial of cert.) No other Takings Clause test applies only to one branch of government – and no persuasive reason exists for *Dolan* to be the sole exception.

2. The Legislative/Adjudicative Distinction is Unworkable and Irrelevant.

The line between legislative and adjudicative actions is notoriously difficult to draw. As the Fifth Circuit has said, there is no "*a priori* basis . . . for distinguishing legislative from adjudicative acts." *Shelton v. City of College Station*, 780 F.2d 475, 480 (CA5 1986); *see also id.*, at 481 (noting that a "state may choose to make a legislative decision [regarding zoning] by a process that resembles adjudication. . . . ").

A formal approach – looking at the particular governmental body responsible for an exaction – would be completely unworkable. By long-standing tradition, local governments do not have to abide by separations of powers principles. *See, e.g., Dreyer v. Illinois*, 187 U.S. 71, 83-84 (1902) ("Whether the legislative, executive and judicial

powers of a State shall be kept altogether distinct and separate . . . is for the determination of the State."); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461 n.6 (1981) ("The states are free to allocate the lawmaking function to whatever branch of state government they may choose."). The result is that "the states enjoy complete hegemony over local governments." Briffault, *Our Localism: Part I – The Structure of Local Government Law*, 90 Colum. L. Rev. 1, 7 (1990).

Most states do not in fact require that local governments be separated into the traditional three branches. *See, e.g.*, Hershkoff, *State Courts and the 'Passive Virtues': Rethinking the Judicial Function*, 114 Harv. L. Rev. 1833, 1884-86 (2001); Reznik, *The Distinction Between Legislative and Adjudicative Decisions in* Dolan v. City of Tigard, 75 N.Y.U. L. Rev. 242, 260-61 (2000). As one scholar observed, "Local government is marked by a profusion of boards, commissions, and authorities that combine legislative and executive authority over various governmental functions." Briffault, *Who Rules at Home?: One Person/One Vote and Local Governments*, 60 U. Chi. L. Rev. 339, 348-49 (1993). Similarly, this Court has observed that local governments usually "cannot easily be classified in the neat categories favored by civics texts." *Avery v. Midland County*, 390 U.S. 474, 482 (1968).[16]

---

[16] *Cf.* Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 Cal. L. Rev. 839, 846 (1983) (stating that " 'legislative' [and] 'judicial' . . . rubrics are drawn from a separation-of-powers doctrine more appropriate to larger governmental units").

A functional distinction – by which legislation is generally applicable and forward-looking while adjudication is particularized and retrospective[17] – has not proven any more workable in practice. For example, rezonings – which may trigger exaction requirements – are prospective in effect but often particular in application. Thus, the States have generally disagreed on how to classify such decisions. Compare *Fasano v. Bd. of County Comm'rs*, 507 P.2d 23, 26 (Or. 1973) (characterizing a zone amendment as adjudicative), *with Arnel Dev. Co. v. City of Costa Mesa*, 620 P.2d 565, 569 (Cal. 1980) (characterizing a zone amendment as legislative); *see also* Hansen, *Quasi-Judicial Land-Use Decision Making in New Castle County*, 4 Del. L. Rev. 191, 206 (2001) (observing that "courts are inconsistent, nationwide, in their determinations of which land-use decisions made by legislative bodies are quasi-judicial in nature"); *Id.* at 205 (noting that courts "sometimes classify rezonings as legislative and sometimes as quasi-judicial decisions").[18]

---

[17] *See United States v. Florida East Coast Railway Co.*, 410 U.S. 224, 245 (1973); *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908) ("A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. . . . Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.").

[18] Sometimes the same court issues conflicting decisions on this question. Compare, *e.g.*, *Board of County Comm'rs v. Snyder*, 627 So.2d 469, 474-75 (Fla. Dist. Ct. App. 1993) (deeming rezoning "quasi-judicial"), *with Board of County Comm'rs v. Karp*, 662 So.2d 718, 719-20 (Fla. Dist. Ct. App. 1995) (deeming a rezoning a "legislative" action).

In fact, state and federal courts often disagree on how to characterize a single state's zoning decisions.[19] Many courts resort to the terms "quasi-adjudicative" or "quasi-legislative."[20] The use of such terminology is, in the famous words of Justice Jackson, "implicit with confession that all recognized classifications have broken down, and 'quasi' is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed." *FTC v. Ruberoid Co.*, 343 U.S. 470, 487-488 (1952) (Jackson, J., dissenting).

3. The *Dolan* Court's Concerns Are More Readily Addressed by a Facial/As-Applied Distinction

The question remains, if a legislative/adjudicative distinction is unworkable, then what did the *Dolan* Court

---

[19] *Compare FM Properties Operating Co. v. City of Austin*, 93 F.3d 167, 174 (CA5 1996) (holding that "land-use decisions" are "'quasi-legislative' in nature"); *Shelton*, 780 F.2d at 479 (same), *with Town of Flower Mound*, 71 S.W.3d at 35 (specifically rejecting *Shelton* and holding that Texas law deems development approval a "quasi-judicial function").

[20] *See, e.g., New Port Largo, Inc. v. Monroe County*, 95 F.3d 1084, 1091 (CA11 1996) (noting that a zoning commission is a "quasi-legislative body"); *Bannum, Inc. v. City of Louisville*, 958 F.2d 1354, 1360 (CA6 1992) ("Zoning is a quasi-legislative function. . . . "); *Smithfield Concerned Citizens for Fair Zoning v. Town of Smithfield*, 907 F.2d 239, 244 (CA1 1990); *Landgate, Inc. v. California Coastal Comm'n*, 953 P.2d 1188, 1198 (Cal. 1998) (characterizing denial of permit as "quasi-adjudicative"); *County of Lancaster v. Mecklenburg County*, 434 S.E.2d 604, 612 (N.C. 1993) (deeming variances, special and conditional use permits, and appeals of administrative determinations "quasi-adjudicative").

The 10th Circuit splits the difference, characterizing zoning decisions as "quasi-legislative or quasi-judicial." *Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence*, 927 F.2d 1111, 1119 (CA10 1991).

mean? Recall that the Court in *Dolan* distinguished earlier cases applying a lower brand of scrutiny on the grounds that they "involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel." *Dolan*, 512 U.S. at 385. The Court also reasoned that the city bore the burden of demonstrating constitutionality because it had "made an adjudicative decision to condition petitioner's applications for a building permit on an individual parcel." *Id.*, at 391 n.8.

It is not entirely clear, however, what the *Dolan* Court actually meant by making the legislative/adjudicative distinction. As Justice Souter pointed out in his dissent, "the majority characterizes this case as involving an 'adjudicative decision' to impose permit conditions, but the permit conditions were imposed pursuant to Tigard's Community Development Code." *Id.*, at 413 n.* (Souter, J., dissenting) (citations omitted). In short, whatever the Court might have meant by referring to an adjudication, it cannot have meant there was no statute authorizing the exaction at issue.

A clearer, but parallel, distinction would be the one between *as-applied* and *facial* challenges. Though this Court has apparently never addressed the issue, the holding of *United States v. Salerno*[21] – by which facial challenges must demonstrate that a law is unconstitutional in all circumstances[22] – applies to the Takings

[21] 481 U.S. 739 (1987).

[22] *Id.*, at 745.

Clause. *See, e.g., Daniels v. Area Plan Comm'n of Allen County*, 306 F.3d 445, 466 (CA7 2001) (applying *Salerno* to takings claim); *Rent Stabilization Ass'n of City of New York v. Dinkins*, 5 F.3d 591, 595 (CA2 1993) (same). Elsewhere, the Court has said that a facial Takings Clause challenge looks to whether the "mere enactment" of the regulation has gone too far, *see Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 736 n.10 (1997), and that the court will look only to the law's "general scope and dominant features . . . leaving other [specific] provisions to be dealt with as cases arise directly involving them." *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 397 (1926).

By all of the above, *Dolan* is an awkward fit in the facial challenge context. The *Dolan* test requires the court to examine the impact caused by a *particular* plaintiff's development, the impact of the *specific* fee or dedication, and then issue a judgment as to whether the two are "roughly proportional." By definition, such an inquiry is far more fact-specific than an attempt to show that all applications are unconstitutional, much less that "mere enactment" constitutes a taking.[23] Thus, the *Dolan* test *inherently* works best for as-applied challenges.

The facial/as-applied distinction has a signal advantage over the legislative/adjudicative distinction: It is easy to administer. All the court need ask is whether the

---

[23] Not that such a showing would be impossible – if a city passed an exaction ordinance that was sufficiently onerous, it might be possible to demonstrate that the exaction was not "roughly proportional" to any conceivable development. Such cases, however, would presumably be rare.

plaintiff has personally been subjected to an exaction, or whether the plaintiff is seeking to challenge the entire exaction scheme. There is no need to address difficult questions such as how to classify the commission that ordered the exaction, or how generally applicable the exaction might be, etc.

CONCLUSION

This Court has often said that takings claims usually involve "essentially ad hoc, factual inquiries." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). It may be that *how* the Takings Clause applies is unavoidably ad hoc, but it should not be so as to *where* and *when* the Clause applies in the first place. If the Court declines to provide further guidance, lower courts will be left to apply an essentially ad hoc test, on an ad hoc basis, and often looking to whether an exaction was applied in an ad hoc manner. The Court should put a stop to this multiplication of ad hocery.

Respectfully Submitted,

TEXAS JUSTICE FOUNDATION
8122 Datapoint, Suite 812
San Antonio, Texas 78229
(210) 614-7157
(210) 614-6656 (Fax)

ALLAN E. PARKER, JR.
Texas State Bar No. 15505500
R. CLAYTON TROTTER
Texas State Bar No. 20240500

STUART BUCK
Virginia State Bar No. 46702

(8)

Supreme Court, U.S.
FILED
DEC 16 2002
CLERK

No. 02 - 0750

In the
Supreme Court of the United States
October Term, 2002

ROGERS MACHINERY CO., INC.,
Petitioner,
v.
CITY OF TIGARD and WASHINGTON COUNTY,
Respondents.

On Petition for Writ of *Certiorari*
to the Oregon Court of Appeals

BRIEF OF *AMICI CURIÆ* NEW ENGLAND LEGAL FOUNDATION AND ATLANTIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

Counsel for Amici Curiæ

MICHAEL E. MALAMUT
Counsel of Record
New England Legal Foundation
150 Lincoln Street
Boston, MA 02111
Tel.: (617) 695-3660
Fax: (617) 695-3656

MARTIN S. KAUFMAN
Atlantic Legal Foundation
150 East 42nd Street
New York, NY 10017
Tel.: (212) 573-1960
Fax: (212) 857-3653

17 pp

QUESTION PRESENTED

May a local government exact development fees it has adopted through a legislative process without complying with the "rough proportionality" standards of *Dolan v. City of Tigard*, 512 U.S. 374 (1994)?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIÆ* 1

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 4

ARGUMENT 4

I. Rough proportionality is the touchstone in analyzing government requirements that penalize property owners for engaging in permitted development 4

II. Repeated attempts by local governments to impose disproportionate impact fees in direct conflict with the takings jurisprudence of this Court and lower courts warrants granting *certiorari* in this case 8

CONCLUSION 12

TABLE OF AUTHORITIES

CASES

City of Portsmouth v. Schlesinger,57 F.3d 12 (1st Cir. 1995) 10

Dolan v. City of Tigard, 512 U.S. 374 (1994).. 4,5,6,7,8,9

Ehrlich v. City of Culver City,12 Cal. 4th 854, 50 Cal. Rptr. 2d 242, 911 P.2d 429, *cert. denied*, 519 U.S. 929 (1996) 6

Nollan v. California Coastal Comm'n,483 U.S. 825 (1987) 5,6,7,8,9

J.E.D. Assocs. v. Atkinson, 121 N.H. 581, 432 A.2d 12 (1981) 5

Parking Association of Georgia v. City of Atlanta, 515 U.S. 1116 (1995) 9

Rogers Machinery Co. v. Washington County, 181 Or. App. 369, 45 P.3d 966, *review denied*, 334 Or. 492, 52 P.3d 1057 (2002) 5,6,7,9

San Remo Hotel v. City of San Francisco,27 Cal. 4th 643, 117 Cal. Rptr. 2d 269, 41 P.3d 87 (2002) 6

Schultz v. City of Grants Pass,131 Or. App. 220, 884 P.2d 569 (1995) 9

South Boston Betterment Trust v. Boston Redev. Auth., 438 Mass. 57 (2002) 10

CONSTITUTION, STATUTES, AND ORDINANCES

U.S. CONST. amend. V 4

U.S. CONST. amend. XIV 4

1987 Mass. Stat. c. 371, § 3 10

2001 Mass. Stat. c. 170 10,11

RULES

SUP. CT. R. 10 (b) 9,11

SUP. CT. R. 10 (c) 9,11

MISCELLANEOUS

Stephanie Ebbert, *Council OK's Hike in Linkage,* Boston Globe, Oct. 18, 2001, at B2 10

Stephanie Ebbert, *Senator Faults Menino's Proposal to Raise Linkage Fees,* Boston Globe, May 15, 2001, at B2 10

Anthony Flint, *Doubling of Linkage Fees Faces Scrutiny,* Boston Globe, Sept. 9, 2002, at B1.. 10,11

Noreen A. Murphy, Note, *The Viability of Impact Fees after* Nollan *and* Dolan, 31 New Eng. L. Rev. 320 (1996) 10

Inna Reznik, Comment, *The Distinction Between Legislative and Adjudicative Decisions in* Dolan v. City of Tigard, 75 N.Y.U. L. REV. 242 (2000) 8

No. 02 - 0750

In the
Supreme Court of the United States
October Term, 2002

ROGERS MACHINERY CO., INC.,
Petitioner,
v.
CITY OF TIGARD and WASHINGTON COUNTY,
Respondents.

On Petition for Writ of *Certiorari*
to the Oregon Court of Appeals

BRIEF OF *AMICI CURIÆ* NEW ENGLAND LEGAL FOUNDATION AND ATLANTIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIÆ*[1]

Amici seek to bring to the Court's attention their views, and those of their supporters, concerning the scope of the takings clause under the Fifth and Fourteenth Amendments to the United States Constitution.

Amicus Curiæ the New England Legal Foundation ("NELF") is a non-profit, public interest law firm, incorporated in Massachusetts in 1977. It is headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who

1 Pursuant to Supreme Court Rule 37.6, counsel for *amici* states that neither counsel for Petitioner nor Respondent authored this brief in whole or in part and no person or entity other than *amici* made a monetary contribution to the preparation or submission of the brief.

believe in NELF's mission of promoting balanced economic growth for New England, protecting the free enterprise system, and defending economic rights. NELF's more than 130 members and supporters include a cross-section of large and small corporations from all parts of New England, and the United States. NELF's members are affected by the real estate development climate in New England, which depends, in part, upon the extent to which development is hampered by fees that bear no relationship to any adverse impact of the development. Furthermore, some of NELF's members are directly interested in real estate development because they own, finance, develop, and manage real estate. For those reasons, NELF's members are concerned about the issues presented this case.

NELF has regularly appeared in state and federal courts, as party or counsel, in cases raising issues of general economic significance to the New England and national business communities. *See, e.g., EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000); *Estados Unidos Mexicanos v. DeCoster*, 229 F.3d 332 (1st Cir. 2000); *Bessette v. Avco Fin. Servs.*, 230 F.3d 439 (1st Cir. 2000), *cert. denied*, 532 U.S. 1048 (2001); *Greater Boston Real Estate Board v. Department of Telecomm. & Energy*, 438 Mass. 197, 779 N.E.2d 127 (2002); *Chandler v. County Commrs.*, 437 Mass. 430, 772 N.E.2d 578 (2002)

Atlantic Legal Foundation ("ALF") is a nonprofit public interest law firm whose mandate is to advocate and protect the principles of limited government, the free-market system, and individual rights. One of Atlantic Legal Foundation's abiding concerns has been the protection of property rights. ALF has represented property owners in New York in an action challenging the constitutionality of the New York Eminent Domain

Procedure Law and before this Court has represented associations of small property owners located throughout the United States as *amici* in cases involving regulatory takings and the application of this Court's teaching in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). *See, e.g., Tahoe-Sierra Pre. Council v. Tahoe Envtl. Planning Agency*, 535 U.S. 302 (2002). ALF is concerned that, unless constrained by a requirement to compensate owners of private property, in a majoritarian system government agencies will unfairly allocate disproportionate burdens of achieving public purposes to politically weak segments of the citizenry.

Amici believe that private property and its protection are important building blocks of democracy. Private property helps distinguish individuals' interests from those of the state, and thus acts as a limit on state power. Requiring compensation for generally applicable, but non-proportional, restraints on use and enjoyment of private property will ensure that the burdens of achieving a socially desirable goal will be equitably allocated among all taxpayers, and it will ensure that the electorate makes informed decisions about policy choices and priorities.

Amici Curiæ therefore believe that this brief may provide an additional perspective which may aid the Court in determining whether to grant the petition for a writ of *certiorari* of the petitioner, Rogers Machinery Company ("Rogers"). Pursuant to Supreme Court Rule 37.2, counsel for *Amici* have secured written consent for the filing of this brief from counsel for Petitioner and Respondent.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case contained in the Brief of the Petitioner, Rogers Machinery Company ("Rogers").

SUMMARY OF ARGUMENT

The Oregon Court of Appeals erroneously concluded that it could uphold a traffic impact regulation because the relevant government agencies imposed the fee pursuant to a regulation that applied uniformly. This Court should grant the petition for certiorari because the decision below failed to apply *Dolan v. City of Tigard*, 512 U.S. 374, 386 (1994) simply because the fee was legislative rather than adjudicative in nature. The decision below deprives the *Dolan* standard of meaning and conflicts with the decisions of other state and federal courts. Moreover, the issue before this Court is not unique. Numerous jurisdictions apply disproportionate exactions with their inherently unfair impact, even when applicable courts have addressed disproportionate impacts clearly and directly.

ARGUMENT

I. Rough proportionality is the touchstone in analyzing government requirements that penalize property owners for engaging in permitted development.

Amici contend that the application by Respondents City of Tigard and Washington County of a traffic impact fee that bears no relationship to actual traffic impact violates the Takings Clause of the Fifth Amendment to the United States Constitution (as applicable through the Due Process Clause of the Fourteenth Amendment).

The Hearings Officer who considered Rogers' application to build made an uncontested finding that Rogers' new building would have no impact on traffic because the new building would simply service existing personnel and clientele in a more comfortable surrounding. Petitioner's Exhibit E at 46. Nevertheless, the Oregon Court of Appeals upheld the Respondents' traffic impact fee based on the square footage of Rogers'

proposed new building and not on its traffic impact because the fee was "legislative" rather than "adjudicative." *Rogers Machinery Co. v. Washington County*, 181 Or. App. 369, 397–98, 45 P.3d 966, 982, *review denied*, 334 Or. 492, 52 P.3d 1057 (2002).

Amici contend that an impact fee, such as the traffic fee in this case, that fails to advance its stated goals constitutes a regulatory taking under the standards of *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374, 386 (1994). Undoubtedly, minimizing traffic impact is a legitimate government purpose. Unless a regulatory land use exaction (such as a one-time traffic impact fee imposed as a condition for property development) substantially advances its legitimate government purpose, however, the "restriction is not a valid regulation of land use but 'an out-an-out plan of extortion.'" *Nollan*, 483 U.S. at 837 (quoting *J.E.D. Assocs. v. Atkinson*, 121 N.H. 581, 584, 432 A.2d 12, 14–15 (1981)).

In order to advance a legitimate government purpose, a government imposition on property development must bear some relationship to the public harm caused by the proposed development. In *Dolan*, this Court described the required nexus between a legitimate state interest and the government regulation intended to advance that interest as "rough proportionality." *Id.*, 512 U.S. at 386.

> We think a term such as "rough proportionality" best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the [governmental] require[ment] . . . is related both in nature

> *and extent* to the impact of the [situation giving rise to the desired regulation]. . . . [T]he city must make some effort to quantify its findings in support of the [regulation] beyond [a] conclusory statement.

Id., 512 U.S. at 391, 395-96 (emphasis added).

This case fits easily within the analytical framework in *Nollan* and *Dolan*. The payment by Rogers of a traffic impact fee is a prerequisite to Respondents' approval of Rogers' proposed new building on its property.

Respondents contend, and the lower court held, that the traffic impact fee in this case was "legislative" rather than "adjudicative" and therefore heightened scrutiny under *Dolan* was inapplicable. *Rogers Mach.*, 181 Or. App. at 397–98, 45 P.3d at 982 (relying on *Ehrlich v. City of Culver City*, 12 Cal. 4th 854, 50 Cal. Rptr. 2d 242, 911 P.2d 429, *cert. denied*, 519 U.S. 929 (1996), and *San Remo Hotel v. City of San Francisco*, 27 Cal. 4th 643, 117 Cal. Rptr. 2d 269, 41 P.3d87 (2002)).

Those cases that attempt to imply a legislative/adjudicative distinction into exactions analysis fundamentally misread the relevant language in *Dolan*:

> The sort of land use regulations discussed in the cases just cited, however, differ *in two relevant particulars* from the present case. First they involve essentially legislative determinations *classifying entire areas of the city*, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. Second, the conditions imposed were not simply a limitation on the use petitioner might make

> of her own parcel, but a requirement that she deed portions of the property to the city. In *Nollan* . . . we held that governmental authority to exact such a condition was circumscribed by the Fifth and Fourteenth Amendments.

Dolan, 512 U.S. at 385 (emphasis added].

Thus the trigger for heightened scrutiny under *Dolan* is disjunctive, not conjunctive; in other words *Dolan* applies if the government land use restriction in question is *either* adjudicative *or* an exaction.

The distinction in *Dolan* between legislative and adjudicative conduct is not the simple division made by the court below. The Oregon Court of Appeals in this case called land-use impositions "legislative" if they are generally applicable and "adjudicative" if they involve discretionary determinations. *Rogers Mach.*, 181 Or. App. at 388–89, 45 P.3d at 976. As Rogers points out and the relevant language demonstrates, *Dolan* in fact distinguishes between legislative ordinances that are of continuing application to large areas (such as a zoning ordinance) and adjudicative ordinances in the form of an exaction that apply to individual parcels only on specific occasions (such as on application for a building permit). Rogers' Petition at 11 & n.7. Thus, reading the *Dolan* legislative/adjudicative distinction in context, it is clear that the traffic impact fee is *adjudicative*, even though it is not discretionary, because it applies only when a property owner applies to build a new building or expand an existing one.

This is illustrated by the facts in *Nollan* and *Dolan*, which both involved generally applicable, nondiscretionary impositions. In *Nollan*, the California Coastal Act required *all* property owners in the applicable area who expanded the size of existing homes by 10% to

grant access to the ocean as a condition for granting a building permit. *Nollan*, 483 U.S. at 830. After the enforcing agency enacted regulations implementing the access condition, it imposed the condition on every relevant permit application. *Id.*, at 829. In *Dolan*, the applicable Community Development Code imposed as a condition for *all* building development adjacent to a floodplain a requirement that the property owner dedicate portions of the floodplain and adjacent area to open space and a bicycle path. *Dolan*, 512 U.S. at 379–80.

Finally, the legislative/adjudicative distinction made by the court below between generally applicable and discretionary conduct fails to address this Court's concerns with exactions as regulatory takings. This Court has applied a regulatory takings analysis when a condition for a building permit creates a "heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective." *Nollan*, 483 U.S. at 841. A property owner should be essentially indifferent as between a generally applicable fee and a discretionary fee of similar amounts. *See* Inna Reznik, Comment, *The Distinction Between Legislative and Adjudicative Decisions in* Dolan v. City of Tigard, 75 N.Y.U. L. REV. 242, 274–75 (2000).

The attempted legislative/adjudicative distinction drawn by the court below is inapplicable in this case because (1) *Dolan*'s legislative/adjudicative distinction does not apply to exactions, (2) *Dolan* considered as "legislative" only ordinances that applied over long periods of time across large sections of a municipality, and (3) under *Nollan*, heightened scrutiny applies whenever the government demands a concession as "a condition to the lifting of a land-use restriction." The decision of the Oregon Court of Appeals below explicitly contradicts the continuing mandate of this Court in

Nollan and *Dolan* and therefore merits review and correction.

II. Repeated attempts by local governments to impose disproportionate impact fees in direct conflict with the takings jurisprudence of this Court and lower courts warrants granting *certiorari* in this case.

Pursuant to Supreme Court Rule 10 (b), *certiorari* is appropriate in this case as the decision of the Oregon Court of Appeals below conflicts with those of other state courts of last resort as detailed in Roger's Petition at 6–10. This Court, over dissent, declined to address the application of the legislative/adjudicative distinction to exactions in *Parking Association of Georgia v. City of Atlanta,* 515 U.S. 1116 (1995) (Thomas, J., joined by O'Connor, J., dissenting). Since that time, a number of additional jurisdictions have issued decisions that take differing positions, making a grant of *certiorari* by this Court more significant in resolving an open question of constitutional law. *See Rogers Mach.,* 181 Or. App. at 392–93, 45 P.3d at 978.

In addition, *certiorari* is warranted pursuant to Supreme Court Rule 10 (c) as this case raises an important constitutional issue that this Court should address. Despite the counsel of this Court and lower courts to the contrary, as discussed above, numerous municipalities across the country continue to pass new and higher impact fees that bear no relation to a building project's actual impact. The pressure for lower courts to concede without guidance from this Court is significant. For example, prior to this case the Oregon Court of Appeals appeared to reject firmly the legislative/adjudicative distinction in evaluating exactions. *Schultz v. City of Grants Pass,* 131 Or. App. 220, 884 P.2d 569 (1995).

The temptation for municipalities to pass impact fees is understandable. Impact fees provide a way for municipalities to pay for services at a time of decreasing federal and state assistance and strong anti-tax sentiment. Noreen A. Murphy, Note, *The Viability of Impact Fees after* Nollan *and* Dolan, 31 New Eng. L. Rev. 320, 213–15 (1996). Impact fees inevitably discourage development, playing to anti-growth sentiment. *Id.* Moreover, developers are reluctant to challenge impact fees because they often can pass them through to the ultimate buyer of the improved property, increasing the cost of all forms of property, including housing

Although it acknowledged the municipality's "realpolitik" desire to maximize income, the United States Court of Appeals for the First Circuit, referring to *Dolan,* deemed improper a generally applicable impact fee because the "amount bore no relation to the capital expenditures for which [the municipality] could impose [an impact fee] requirement . . . ." *City of Portsmouth v. Schlesinger,* 57 F.3d 12, 17 (1st Cir. 1995). Despite (1) the applicability of *City of Portsmouth* to Massachusetts as a jurisdiction within the First Circuit and (2) voices decrying constitutional problems with non-proportional impact fees, the City of Boston recently raised its "housing and employment exaction requirements" (also called "linkage fees"). *See* 2001 Mass. Stat. c. 170; 1987 Mass. Stat. c. 371, § 3; *South Boston Betterment Trust v. Boston Redev. Auth.,* 438 Mass. 57 (2002); Stephanie Ebbert, *Council OK's Hike in Linkage,* Boston Globe, Oct. 18, 2001, at B2; Stephanie Ebbert, *Senator Faults Menino's Proposal to Raise Linkage Fees,* Boston Globe, May 15, 2001, at B2 (questioning constitutionality of linkage fees); Anthony Flint, *Doubling of Linkage Fees Faces Scrutiny,* Boston Globe, Sept. 9, 2002, at B1. Similar to the exactions in this case, linkage fees in both Boston and Cambridge are based on the square footage

of the proposed project without regard to actual impact. *See* 2001 Mass. Stat. c. 170, § 4; Flint, *supra*.

Given the seductive lure of raising funds without direct costs to the government, municipalities will continue to have incentives to impose non-proportional impact fees. This Court should grant *certiorari* because of the ease with which municipalities can raise funds through impact fees and the practical disincentives for developers to challenge such assessments. This Court's determination could deter the severe economic distortions caused by non-proportional impact fees in the vital real estate development sector.

This case thus raises a matter of national concern that this Court has not previously considered in the context of the forced legislative/adjudicative distinction between otherwise identical impositions on property owners. This Court should therefore grant *certiorari* in this case pursuant to Supreme Court Rule 10 (b) because the decision below conflicts with decisions in other jurisdictions and pursuant to Rule 10 (c) because it raises an important question of federal law.

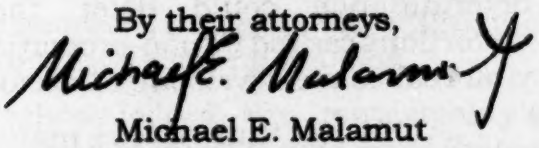
CONCLUSION

For the reasons stated above, this Court should grant Rogers Machinery Company's petition for a writ of *certiorari*.

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION and ATLANTIC LEGAL FOUNDATION,

By their attorneys,



Michael E. Malamut
Counsel of Record
Counsel for Amici Curiæ
New England
Legal Foundation
150 Lincoln Street
Boston, MA 02111
Telephone: (617) 695-3660
Facsimile: (617) 695-3656

Martin S. Kaufman
Atlantic Legal Foundation
150 East 42nd Street
New York, NY 10017
Telephone: (212) 573-1960
Facsimile: (212) 857-3653

Dated: December 16, 2002

Supreme Court U.S.
FILED
DEC 27 2002
OFFICE OF THE CLERK

No. 02-750

IN THE

Supreme Court of the United States

ROGERS MACHINERY COMPANY, INC.,
Petitioner,

v.

CITY OF TIGARD, AND
WASHINGTON COUNTY,
Respondents.

Petition for a Writ of Certiorari to the Oregon Court of Appeals

REPLY BRIEF

DAVID J. HUNNICUTT *
DOROTHY S. COFIELD
OREGONIANS IN ACTION
LEGAL CENTER
8255 S.W. Hunziker Rd.
Suite 200
Tigard, Oregon 97283
(503) 620-0258

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTRODUCTION	2
I. REPLY TO COUNTER-STATEMENT OF THE CASE	1
A. By Its Express Terms, the TIF Ordinance is a Condition of Approval for the Issuance of a Building or Occupancy Permit	1
B. The Hearings Officer's Finding that Petitioner's New Building Would Generate No Additional Traffic was an "Ordinary Factual Finding" and Has Not Been Challenged	2
II. REPLY TO RESPONDENTS' SUGGESTED REASONS FOR DENYING REVIEW	3
A. The Decision by the Oregon Court of Appeals Was Erroneous	3
B. The Tax v. Fee Distinction Respondents' Attempt To Draw is Irrelevant and Does Not Preclude Review By This Court. In Any Event, the TIF is a Fee, Not a Tax	4
i. Contrary to Respondents' Assertions, the Oregon Court of Appeals Held that the TIF was not a Tax	4
ii. The Lower Courts Analyzing the Applicability Of Dolan to Legislatively Adopted Monetary Exactions Have Not Drawn the Distinction Between Taxes and Fees	4

TABLE OF CONTENTS—Continued

Page

iii. The TIF is not a Tax. It is a Poorly Designed Impact Fee 5

C. Payment of the TIF is Required Before Obtaining a Building or Occupancy Permit. 6

D. The Oregon Court of Appeals, Numerous Legal Scholars, and the Only Members of This Court Who Have Written on the Issue Have Noted the Split in the Lower Courts on the Issue Presented in this Case 6

E. Certiorari Should Not Be Denied Simply Because the Challenged Decision is From the Oregon Court of Appeals, and not the Oregon Supreme Court 7

CONCLUSION 7

TABLE OF AUTHORITIES

CASES — Page

Dolan v. City of Tigard, 512 U.S. 374 (1994) ..... *passim*

Parking Association of Georgia, Inc. v. City of Atlanta, 450 S.E.2d 200 (Ga. 1994), *cert. denied*, 515 U.S. 1116 (1995) 7

Scappoose Sand and Gravel, Inc. v. Columbia County, 161 Or.App. 325, 984 P.2d 876, *rev. den.*, 329 Or. 528 (Or 1999) 5

United States v. Sperry Corp., 493 U.S. 52 (1989) 5

UNITED STATES CONSTITUTION

Amend. V 8

STATUTE

ORS 223.299 4

MISCELLANEOUS

Faus, *Exactions, Impact Fees, and Dedications—Local Government Responses to Nollan/Dolan Takings Law Issues*, 29 Stetson L. Rev. 675 (2000) 7

IN THE

Supreme Court of the United States

No. 02-750

ROGERS MACHINERY COMPANY, INC.,
Petitioner,

v.

CITY OF TIGARD, AND
WASHINGTON COUNTY,
Respondents.

Petition for a Writ of Certiorari to the Oregon Court of Appeals

REPLY BRIEF

INTRODUCTION

In their Brief in Opposition, Respondents Washington County and City of Tigard attempt to obscure the issue raised by Petitioner in its Petition for Certiorari. In doing so, the Respondents misstate facts and raise arguments that are both erroneous statements of law and are irrelevant to the issues pending in this matter.

I. REPLY TO COUNTER-STATEMENT OF THE CASE

A. By Its Express Terms, the TIF Ordinance is a Condition of Approval for the Issuance of a Building or Occupancy Permit.

In their counter-statement of the case, Respondents claim that the City of Tigard granted development approval to

Petitioner in September, 1996, but did not impose the traffic impact fee (TIF) until February, 1997. Res. Brief at 2. This statement is apparently made in an attempt to convince the court that payment of the TIF is not a condition for approval of a permit.

But the Respondents fail to mention that once the TIF was calculated and imposed upon Petitioner, the City refused to grant Petitioner a permit to occupy its building until such time as Petitioner paid the TIF, or made arrangements to do so. This should come as no surprise to anyone—the TIF ordinance (Section 3.17.060) expressly provides that the City will not issue a building permit until the TIF is paid, unless it is deferred. Pet. App. F at 54a. The City has the ability to defer payment of the TIF, but only until issuance of the occupancy permit, the final stage of the permitting process (Section 3.17.060(B)). In other words, before Petitioner could use its building, it had to satisfy the condition of paying the TIF, which it did.

Respondents also fail to mention that the Oregon Court of Appeals specifically held that the TIF was assessed and collected when a development permit issues. Pet. App. A at 9a.

B. The Hearings Officer's Finding that Petitioner's New Building Would Generate No Additional Traffic was an "Ordinary Factual Finding" and Has Not Been Challenged.

Respondents also claim that the Hearings Officer's unchallenged finding that Petitioner's new building would generate no additional traffic is not an "ordinary factual finding" because it was not a fact to be determined in that hearing. Res. Brief at 2 (fn.3). But of course it was.

Petitioner's challenge to the TIF was based on the failure of the TIF, as applied to Petitioner, to comply with the "rough proportionality" requirements set out by this Court in *Dolan*

v. City of Tigard, 512 U.S. 374 (1994). The Hearings Officer rejected Petitioner's argument, holding that, "although the law is less than clear," the TIF is a tax. Pet. App. E at 44a-46a. The Hearings Officer was then required to analyze the TIF ordinance language to determine whether the actual trips that a new development would generate had any relevance in the calculation of the amount of the fee.

In the course of analyzing the ordinance language, the Hearings Officer made an express finding that Petitioner's new building would generate no additional traffic. Pet. App. E at 46a. Although the Hearings Officer ultimately determined that the actual traffic generated by a development did not figure into the TIF calculation, the Hearings Officer nevertheless made a finding as to the specific amount of new traffic (zero) that would be generated by Petitioner's new building.

II. REPLY TO RESPONDENTS' SUGGESTED REASONS FOR DENYING REVIEW

A. The Decision by the Oregon Court of Appeals was Erroneous.

Respondents make a number of assertions in support of their request that this Court deny review. First, they argue that the Oregon Court of Appeals was correct in its decision. Respondents' argument on this point is fully countered in the Petition for Certiorari and in the briefs by the various amici curiae filed in this case. Respondents' argument would force this Court to draw a further distinction between various types of exactions, something that this Court has not done and that is inconsistent with *Dolan*.

B. The Tax v. Fee Distinction Respondents' Attempt to Draw is Irrelevant and Does Not Preclude Review By This Court. In Any Event, the TIF is a Fee, Not a Tax.

Respondents next argue that this Court cannot reach Petitioner's argument regarding the applicability of *Dolan* to the TIF, because the TIF is a tax that is not subject to the Takings Clause. Res. Brief at 8. There are a multitude of problems with this argument.

i. *Contrary to Respondents' Assertions, the Oregon Court of Appeals Held that the TIF was not a Tax.*

Contrary to the Respondents' assertion, the Oregon Court of Appeals held that the TIF was not a tax, finding that the TIF has characteristics of both a tax and a fee, and therefore has a "hybrid quality."[1] Pet. App. A at 12a-13a.

ii. *The Lower Courts Analyzing the Applicability of* Dolan *to Legislatively Adopted Monetary Exactions Have Not Drawn the Distinction Between Taxes and Fees.*

Despite the many courts that have considered the applicability of *Dolan* to exactions involving monetary exactions, Petitioners cite no case (nor are there any) where a lower court has analyzed the nature of the monetary exaction or made the tax/fee distinction before determining whether to apply *Dolan*.

---

[1] The Oregon Court of Appeals also held that the TIF was a systems development charge under Oregon law. Pet. App. A at 9a. Specifically, the court held that the TIF was an "improvement fee" under ORS 223.299(2). A systems development charge is defined as a "reimbursement fee, an improvement fee or a combination thereof assessed or collected at the time of increased usage of a capital improvement or issuance of a building permit or connection to the capital improvement." ORS 223.299(4)(a).

iii. *The TIF is not a Tax. It is a Poorly Designed Impact Fee.*

Finally, even if the distinction between a tax and a fee was relevant for purposes of the applicability of *Dolan*, the Oregon Court of Appeals rejected Respondents' assertion that the TIF is a tax (Pet. App. A at 12a-13a),[2] and the TIF would not constitute a tax under this Court's prior decisions. As this Court noted in *United States v. Sperry Corp.*, 493 U.S. 52, 60 (1989), a user fee need not be precisely calibrated to the use that a party makes of government services. All that is required is that the fee approximate the cost of benefits supplied.

In this case, by its own terms, the TIF ordinance (Section 3.17.020(A)) is designed to "ensure that new development contributes to extra capacity transportation improvements needed to accommodate additional traffic generated by such development." Pet. App. F at 47a. The amount of each individual fee calculated under the TIF ordinance is purportedly based upon the number of new traffic trips generated by a new development, which in turn necessitates traffic improvements to offset those new trips.

In other words, the TIF ordinance is designed to ensure that property owners who choose to develop their land pay a fee for the benefit (an adequate transportation system) that the City provides. The City has attempted to approximate the amount of new traffic generated by each new development in order that it charge a fee that is proportionate to the impact of each new development. By definition, that makes the TIF a user fee, not a tax.

But as applied to Petitioner, the TIF ordinance does not approximate the value of the benefits received. Since Petitioner will generate no additional traffic, there is no need

---

[2] Also cf. *Scappoose Sand and Gravel, Inc. v. Columbia County*, 161 Or. App. 325, 984 P.2d 876, *rev. den.*, 329 Or. 528 (Or. 1999).

for the City to make any additional traffic improvements to maintain its existing transportation system. Hence, there is no need for Petitioner to pay a traffic impact fee. But the fact that Petitioner's $37,018 fee payment is not needed to offset Petitioner's non-existent new traffic does not mean that the TIF ordinance is a tax – it simply means that the TIF ordinance, as applied to Petitioner, violates *Dolan*. The City has simply managed to extort $37,018 from Petitioner in exchange for a development permit.

C. Payment of the TIF is Required Before Obtaining a Building or Occupancy Permit.

Respondents next claim that the imposition of the $37,018 TIF was not a condition of approval for Petitioner's development. This is contrary to the findings of the Oregon Court of Appeals, which held that the TIF "unquestionably is what in land use parlance is termed an 'impact' or 'development fee" that is charged "on developers as a condition of zoning changes, building and development permits, or other governmental approvals necessary for new and, generally, more intensified development to occur." Pet. App. A at 14a.

Respondents claim is also contrary to the express language of Section 3.17.060 of the TIF ordinance, which prohibits the issuance of a building or occupancy permit until the TIF has been paid. Pet. App. F at 54a.

D. The Oregon Court of Appeals, Numerous Legal Scholars, and the Only Members of This Court Who Have Written on the Issue Have Noted the Split in the Lower Courts on the Issue Presented in this Case.

Respondents also assert that the cases cited by Petitioner do not demonstrate that there is a "significant" conflict between the lower courts on the applicability of *Dolan* to

legislatively adopted monetary exactions. Res. Brief at 13-17. Apparently, Respondents are the only ones who share that opinion. In fact, the Oregon Court of Appeals expressly noted the split of authority in its opinion in this case. Pet. App. A at 22a. This echoes the commentary from the legal community. *See* Faus, *Exactions, Impact Fees, and Dedications—Local Government Responses to Nollan/Dolan Takings Law Issues*, 29 Stetson L. Rev. 675, 704-06 (2000). And the only two members of this Court who have written on the issue have noted the split, and indicated that this Court should attempt to resolve it. *Parking Association of Georgia v. City of Atlanta*, 450 S.E.2d 200 (Ga. 1994), *cert. denied*, 515 U.S. 1116 (1995) (Thomas, J., dissenting).

E. Certiorari Should Not Be Denied Simply Because the Challenged Decision is From the Oregon Court of Appeals, and not the Oregon Supreme Court.

Finally. Respondents assert that certiorari should not be granted because the challenged decision in this case was made by the Oregon Court of Appeals, and not the Oregon Supreme Court. Res. Brief at 17. But in the nearly nine years since this Court issued its opinion in *Dolan*, the Oregon Supreme Court has yet to decide a case involving the application of *Dolan*, despite a substantial body of case law on *Dolan* that has been developed by the Oregon Court of Appeals. Respondents' argument, if accepted, would essentially mean that the highest court in each state would set the docket for this Court. Obviously, that is not the case.

CONCLUSION

Petitioner (and the various amici who have filed briefs in this matter) has demonstrated a clear and unavoidable conflict in the lower courts on the applicability of *Dolan* to legislatively adopted monetary exactions. The scholarly commu-

nity, along with many lower courts and members of this Court have asked this Court to resolve the conflict. The issue is presented squarely before this Court in this case.

In addition, if this Court accepts Respondents' arguments, then *Dolan* becomes an essentially meaningless decision, as local governments will simply use excessive "one size fits all" fee exactions as a replacement for excessive real property exactions to avoid the heightened scrutiny in *Dolan*. The Takings Clause should not be ignored in this manner.

Respectfully submitted,

DAVID J. HUNNICUTT *
DOROTHY S. COFIELD
OREGONIANS IN ACTION
LEGAL CENTER
8255 S.W. Hunziker Rd.
Suite 200
Tigard, Oregon 97223
(503) 620-0258

* Counsel of Record